***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

B

P/S

# 75-2069

# United States Court of Appeals

**For the Second Circuit.**

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DONALD WALLACE, et al., on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

*Plaintiffs-Appellees,*

-against-

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, etc., et al.,

*Defendants-Appellants,*

---

THE UNITED STATES OF AMERICA ex rel.
MICHAEL A. McLAUGHLIN, et al.,

*Plaintiffs-Appellees,*

-against-

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

*Defendants-Appellants.*

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MICHAEL A. McLAUGHLIN, et al.,

*Plaintiffs-Appellees,*

-against-

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

*Defendants-Appellants.*

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*On Appeal From The United States District Court*
*For The Eastern District Of New York*

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# Appendix

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*Attorney for State Defendants-Appellants*
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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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72C 898

DOCKET 1

TITLE OF CASE

[redacted], MAURICE HUNDLEY, ALICE [redacted], WILBERT DONALD, BARRY WILSON, RUDOLPH JENKINS, RUDOLPH BROWN, JAMES BROWN, DAVID JONES, DONALD McCOY, WILLIAM McDONALD, OLIVER STEWART and LAWRENCE CURRY on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs,

- against -

[redacted], MICHAEL KERN, [redacted], THOMAS E. MORRISSEY, JR., OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, BEATRICE M. JUDGE, ABRAHAM J. MULTER, WILLIAM T. COMIN, MAURICE BERNHARDT, HARRY GITTLESON, S. REYNART ALTER, JOHN R. STARKEY, HYMAN BARSHAY, MURRAY H. PEARLMAN, CARMINE A. VENTIMIA, J. BERTRAM WEGMAN, DOMINIC S. RINALDI, J. COURTNEY McGOVERN, MURRAY T. MEIDEN, CHARLES J. BECKINELLIS, SIMON A. LIEBOWITZ, ANTHONY J. DIGIOVANNA, LOUIS B. HELLER, HAROLD J. McLAUGHLIN, AARON E. KOOTA, GEORGE H. NICOLS, FRANK J. FINO, FRANK S. SAMINSKY, JOSEPH R. CORSO, JOHN E. CONE, THEODORE G. BARLOW, IRVIN BROWNSTEIN, JOHN A. CARBARINO, THOMAS R. JONES, GUY J. MANGANO, MILTON MOLLEN, FRANKLIN W. HORTON, JR., VITO J. TITONE, [redacted], FRANK COMPOSTO, ARTHUR J. HIRSCH, ABRAHAM J. SALINA, IRVING P. KANTER, ALBERT S. McGROVER, [redacted], JOHN A. MONTELEONE, CHARLES R. RUBIN, JOSEPH H. SOVIERO; individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; BENJAMIN MALCOLM, individually and as Commissioner of Correction of the City of New York; CHARLES FASCOV, individually and as Chief Probation Officer of Kings County; JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County;

Defendants.

See Memo 2-27-73

ATTORNEYS

FOR PLTFFS:

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| | | | |
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RECEIPTS, REMARKS, ETC.

# 72C 898 DONALD WALLACE, et al, etc. v. SUPREME COURT JUSTICES, etc., et al

| DATE | FILINGS - PROCEEDINGS | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---|---|---|
| 7/3/72 | Complaint filed. | 1JS5 |
| 7-11-72 | By WEINSTEIN, J.- MEMORANDUM & ORDER FILED, The clerk will serve copies of this memorandum and order, the complaint and a summons by mail on each of the defts named in the complaint and upon the Atty General of the State of New York and the New York City Corporation Counsel. The Clerk will mail a copy of this memorandum and order to the first-named pltff. Further action will await appropriate motions by the parties SO ORDERED. | 2 |
| 7-11-72 | Summons issued. Copy of complaint summons and memorandum & order mailed to each of defts named in complaint and Louis J. Lefkowitz, Attorney General and J. Lee Rankin, Corporation Counsel. Copy of memorandum & order mailed to Donald Wallace 275 Atlantic Ave. Brooklyn, N.Y. | |
| 7/24/72 | Petitioners' letter of 7/13/72 re: representation by counsel filed. | 3 |
| 7/24/72 | By Weinstein,J.-Order of 7/20/72 appointing Stephen M. Latimer as counsel for pltffs filed. (Copy oforder mailed to defts, Atty Genrl.,S. of N.Y., Corp.Csl. & pltff Wallace) | 4 |
| 7-26-72 | MOTION FILED FOR TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION. | 5 |
| 8-1-72 | Before WEINSTEIN, J.- Motion for preliminary injunction adjd without date - Preliminary conference on evidentiary hearing set for Spet 19, 1972 at 9:30 A.M. - Orders to be submitted on 3 days notice. | |
| 8-1-72 | Notice of appearance (Hillel Hoffman, Esq) atty for defts filed | 6 |
| 8-1-72 | Notice of appearance (Alvin J. Bronstein Esq) atty for pltffs filed. | 7 |
| 8-1-72 | Notice of appearance (William M. Kunstler,Esq) atty for pltffs filed. | 8 |
| 8-1-72 | Notice of appearance (Daniel Z. Alterman,Esq) atty for pltffs filed. | 9 |
| 8-8-72 | Order to show cause with proof of service filed, restraining from transferring Maurice Hundley and Donahue Epps from Bklyn House of detention etc. (ret Aug 9, 1972) | 10 |
| 8-9-72 | Before WEINSTEIN, J.- Hearing on show cause restraining from transferring Hundly & Epps from Bklyn House of Detention etc. Motion argued & Denied -- Hearing on pltff's proposed order concerning pltffs' investigation of Kings County Supreme Court | |

Pg. 3 72C898 DONALD WALLACE ,et al v. SUPREME COURT JUSTICES, et al

CIVIL DOCKET

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOU REPORTE ENDORSE RETUR |
|---|---|---|---|---|
| 8/18/72 | By Weinstein,J.-Order (endorsed on inside of unsigned proposed order) dtd 8/16/72 directing that pltffs' submit new order on 3 days' notice as indicated filed. (Copies of within order mailed to counsel & notified by telephone bjk) | | | 11 |
| 8/18/72 | Letter from Elliott Hoffman, Asst Corp Csl filed. | | | 12 |
| 8-24-72 | By WEINSTEIN, J.- It is ordered that the Clerk of the Criminal term of the Supreme Court, State of N.Y. Kings County, permit pltffs' attys etc., to inspect, examine, copy, and reproduce by any means all public records, files, documents and other material concerning all prosecutions etc. (P/C mailed to attys) | | | 13 |
| 8-24-72 | Before WEINSTEIN, J.- Case called - Counsel for pltffs and Defts and N.Y.C. Dept of Corrections present - Proposed order signed as amended. | | | |
| 9-6-72 | Stenographers transcript dtd 8-24-72 filed. | | | 14 |
| 10-13-72 | Order to show cause with proof of service filed, compelling defts Malcolm and Monroe to produce pltffs etc. (ret Oct 16, 1972) | | | 15 |
| 10/16/72 | Before Weinstein,J.-Case called for hearing on pltff's motion to compel deft's production of pltffs-Motion argued & granted-Order signed. | | | |
| 10/16/72 | Amended complaint filed. Supplemental summons issued. | | | 16 |
| 10/17/72 | Before Weinstein,J.-Case called-Pre-trial conference held & concluded-Motion to extend time to answer to 11/3/72 granted-Case adj'd for further pre-trial w/o date. | | | |
| 10/18/72 | Stenographers transcript of 10/16/72 filed. | | | 17 |
| 10/18/72 | Stenographer's transcript of 10/17/72 filed. | | | 18 |
| 10/25/72 | Supplemental summons returned &filed/executed as to Malcolm & Gold | | | 19 |
| 10-31-72 | Notice of motion filed, requiring deft of Correction to transfer Wilbert Donald & Maurice Hundley to Bklyn House of Detention etc. (ret Nov 6, 1972) | | | 20 |
| 11/8/72 | By Weinstein,J.-Order extending defts' time to answer to complaint to 11/7/72 filed. | | | 21 |
| 11/13/72 | Before WEINSTEIN, J. Case called and adjd to 11-17-72 at 2 PM Pltff to make motion for summary judgment as to one of the inmates Wilbur Donald. | | | |

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES: PLAINTIFF | CLERK'S FEES: DEFENDANT | AMOUNT REPORTED IN EMOLUMENT RETURNS | |
|---|---|---|---|---|---|
| 14/72 | Defts' memo of law filed. | | | | 22 |
| 14/72 | Notice ofmotion ret 12/14/72 for an order dismissingcomplaint filed | | | | 23 |
| /17/72 | Before Weinstein,J.-Case called for hearing on pltff's motion directing transfer of certain defts-Hearing held & concluded-Named plaintiffs (DONALD & HUNDLEY) be transferred back to Bklyn-Transl. to be supplied within 5 days-Distribution within 2 wks-Pltff's applic for relief denied. | | | | |
| 4/72 | Affidavit of Benjamin J Malcolm filed | | | | 24 |
| 5/72 | Pltffs' memo of law filed. | | | | 25 |
| /14/72 | Before Weinstein,J-Case called-Transferred | | | | |
| 9/73 | By Judd,J.-Order dtd1/26/73 granting leave to pltffs to serve/file 2nd amended complaint filed. | | | | 26 |
| 9/73 | Second amended complaint filed. | | | | 27 |
| 2-73 | Memorandum of law in support of defts' motion to dismiss pltffs' second amended complaint filed. | | | | 28 |
| 7-73 | Notice of motion ret 2-13-73 to maintain case as a class action filed. | | | | 29 |
| 7-73 | Pltffs' memorandum of law in opposition to defts' motion to dismiss complaint filed. | | | | 30 |
| 0-73 | Pltff's memorandum of law pursuant to Rule 23 F.R.Civ.P. filed. | | | | 31 |
| 8-73 | Before JUDD, J. - Case called for hearing on pltff's motion to maintain suit as a class action. Attys for both sides present. Deft's motion to dismiss. Motion argued. Decision reserved. Pltff's motion to maintain suit as a class action argued. Decision reserved. Case adjourned to 2-15-73 for pre-trial conference on hearing for preliminary injunction, and to 2-21-73 for hearing on pltff's demand for preliminary injunction. | | | | |
| -73 | Deft MALCOLM's first interrogatories to pltffs filed. | | | | 32 |
| -73 | Defts' reply memo of law filed. / | | | 33 | |
| 5-73 | Before JUDD, J. - Case called. Attys for both sides present. Pre-trial conference held and concluded. Case adjourned to 2-21-73 for hearing on pltff's motion for preliminary injunction. | | | | |
| -73 | By JUDD, J. - Memorandum and Order dtd 2-15-73 ordering a hearing on pltffs' motion for a preliminary injunction ret 2-21-73 filed. (P/C mailed to attys). | | | 34 | |
| -73 | By JUDD,J.-Order filed re: delivery of prisoners to and from Courthouse for 2-21-73 hearing. | | | 35 | |

Continued

age 5

DONALD WALLACE, et al -vs- MILES F. McDONALD, et al

CIVIL DOCKET 72C-898

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUNT REMITTED EMOLUMENT RETURN |
|---|---|---|---|---|
| 2-21-73 | By JUDD, J. - Supplemental order dtd 2-20-73 re production of Marisal McNair filed. | | 36 | |
| 2-21-73 | By JUDD, J. - Supplemental order dtd 2-21-73 re delivery of inmates filed. | | 87 | |
| 2/21/73 | Before Judd, J.-Case called-Pre-trial Con. held & adj'd to 2/22/73 | | | |
| 2-22-73 | Before JUDD, J. - Case called. Attys for both sides present. Pltffs present. Pltff rests. Defts rest. Both sides summations. Both sides to submit post-hearing memos in 2 weeks. Decision reserved. Hearing concluded. | | | |
| 2-23-73 | By JUDD, J. - Order dtd 2-23-73 that Wilbert Donald not be removed from Brooklyn House of Detention prior to 3-8-73 filed. | | 38 | |
| 2/27/73 | By Judd, J.-Memorandum & order filed denying motion to dismiss, except that the complaint is dismissed as to defts Miles F. McDonald, James S. Brown, Thomas E. Morrissey, Jr., A. David Benjamin and Henry Martuscello. Pltff's motion to maintain as a class action is granted, etc. | | 39 | |
| 3/7/73 | Transcript dtd 2/21/73 filed | | 40 | |
| 3-12-73 | Notice of motion to amend complaint ret 3-15-73 filed. | | 41 | |
| 3/14/73 | By Judd, J.-order extending pltffs. time to answer to dtd 3/13/73 4/6/73 filed. | | 42 | |
| 3-15-73 | Before Judd, J. Case called-Attorneys for all sides present-Motion agued-Decision reserved-Both sides to submit further briefs by 3-19-73. | | | |
| 3-20-73 | Pltffs' memorandum of law in support of motion for preliminary relief filed. | | 43 | |
| 3-20-73 | Proposed findings of fact & conclusions of law and proposed order filed. | | 44 | |
| 3-20-73 | Defts' post-hearing memorandum of law in opposition to pltffs' motion for a preliminary injunction filed. | | 45 | |
| 3-22-73 | By JUDD, J. - Order to show cause ret 3-29-73 why pltffs' request for relief against deft Justices of the Supreme Court should not be made, etc filed. | | 46 | |
| 3-22-73 | Letter from James Jenkins to Judge Weinstein dtd March 1973 filed. | | 47 | |
| 3-23-73 | By JUDD, J.-Order dtd 3-22-73 granting pltff's motion for permission to amend the second amended complaint, etc. filed. | | 48 | |

D. C. 110

| | FILINGS—PROCEEDINGS | CLERK'S FEE: PLAINTIFF | CLERK'S FEE: DEFENDANT | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---|---|---|---|---|
| '3 | Memo of the Criminal Defense Division of the Legal Aid Society, Filed. | | | 49 |
| 3 | Pltff's notice of motion ret. 3-30-73 for an Order joining Lindsay, Garelik etc as defts on the above action, Filed. | | | 50 |
| -73 | Pltffs' suppl memorandum of law in support of motion for preliminary relief filed. | | | 51 |
| 73 | Memo in support of motion to join necessary parties filed. | | | 52 |
| 73 | Before JUDD, J. - Case called for hearing on pltffs' motion for an order joining other defts and for preliminary injunction. Attys for both sides present. Motions argued. Order certifying this action as a class action signed. Decision reserved. | | | |
| 73 | By JUDD, J. - Order dtd 3-29-73 certifying this action as a class action filed. | | | 53 |
| 3 | ANSWER of deft judges court personnel & district attorney to the second amended complaint filed. | | | 54 |
| 73 | By Judd, J. - Memorandum & Order dtd. 4/2/73 denying motion to join additional defendants except etc. filed. | | | 55 |
| 3 | Stenographer's transcripts dtd. 2/13/73 filed. | | | 56 |
| 3 | Stenographer's transcripts dtd. 3/29/73 filed. | | | 57 |
| 73 | Notice of appearance filed. | | | 58 |
| 73 | Pltffs' answer to deft Malcolm's first interrogatories filed. | | | 59 |
| 73 | By JUDD, J. - Writs issued as to pltffs McCoy and Jenkins ret. 4-30-73. | | | |
| 73 | Reply memorandum of the association of Legal Aid Attys filed. | | | 60 |
| 73 | Before JUDD, J. - Case called. Attys for both sides present. Hearing continued. Hearing condluded. Decision reserved. | | | |
| 73 | Affidavit of Joel Walter filed. | | | 61 |
| 73 | Answer of deft Malcolm to second amended complaint filed. | | | 62 |
| 73 | By JUDD, J. - Memorandum dtd 5-10-73 filed. | | | 63 |
| 73 | By JUDD, J. - Order dtd 5-10-73 for a preliminary injunction against the Clerk of the Supreme Court, Kings County and the Legal Aid Society of the City of New York, etc. filed. | | | 64 |
| 3 | Notice of motion returnable 5/18/73 & memorandum of law in support of pltffs, motion for consolidation filed. | | | 65/66 |
| 73 | Supplemental complaint to second amended complaint filed. | | | 67 |
| 73 | Before JUDD, J. - Case called for hearing on deft's motion for order modifying order. Attys for all sides present. Motions for modification of court order argued. Decision reserved. | | | |

continued

page 7 DONALD WALLACE, et al vs SUPREME COURT JUSTICES, et al
CIVIL DOCKET 72C-898

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUN REPORTED EMOLUME RETURN |
|---|---|---|---|---|
| 5-21-73 | Letter from Mr. Keating dtd 5-18-73 filed. | | 68 | |
| 5/23/73 | By Judd,J.-Supplemental Order dtd.5/22/73 relating to preliminary injunction filed. | | 69 | |
| 5-24-73 | Pltffs' interrogatories to defts filed. | | 70 | |
| 5-25-73 | Stenographer's transcripts dtd Feb. 21&22, 1973 filed. | | 71/72 | |
| 5-25-73 | Copy of letter from Judge Weinstein to Stephen Lattimer dtd 11-17-72 filed.(letter from Wilder annexed). | | 73 | |
| 5-25-73 | Letter from Hillel Hoffman dtd 11-20-72 to Judge Weinstein filed. | | 74 | |
| 5-25-73 | Copy of letter from Stephen M. Latimer dtd 11-21-72 to Austin Wilder filed. | | 75 | |
| 5-25-73 | Notice of appeal filed by the Legal Aid Society. JN | | 76 | |
| 5-25-73 | Record on appeal certified and handed to Sandy Sadowitz for delivery to the Court of Appeals. | | | |
| 5-29-73 | Notice of appeal filed by Atty General State of N.Y. Duplicate mailed to C of A. | | 77 | |
| 6-4-73 | Acknowledgment received from C of A for receipt of record on appeal and filed. | | 78 | |
| 6-4-73 | By JUDD, J. - Memorandum and order dtd 5-29-73 granting consolidation filed. (see order). | | 79 | |
| 6-2-73 | By JUDD, J. - Order to show cause for an order prohibiting the deft justices from assigning any cases to any Legal Aid Society Attorney, etc. ret7-13-73 with proof of service filed. | | 80 | |
| 7-3-73 | Certified copy of judgment received from C of A reversing order of this court and filed. jn | | 81 | |
| 7-12-73 | By JUDD,J.-Writ issued ret. 7-13-73 as to pltff.McNair. | | | |
| 7-13-73 | Before JUDD, J. - Case called for hearing on order to show cause prohibiting deft justices from assigning any cases to any Legal Aid Society Atty in Supreme Court, etc. Attys for both sides present. Motion argued. Decision reserved. | | | |
| 7-13-73 | Affidavit of Hillel Hoffman in opposition to pltffs' motion to enjoin the deft judges, etc. filed. | | 82 | |
| 7-18-73 | Defts' memorandum of law in support of renewed motion to dismiss pltffs' speedy trial claim, etc. filed. | | 83 | |
| 7-19-73 | Pltffs' memorandum of law in support of motion for a preliminary injunction. filed. | | 84 | |

| | PROCEEDINGS | | |
|---|---|---|---|
| 23-73 | Defts' answer to pltffs' interrogatories filed. | | 85 |
| 23-73 | Brief of the NYC Board of Correction in behalf of pltffs' motion for a preliminary injunction filed. | | 86 |
| 0-73 | Before JUDD, J.--Case called. Attys for both sides present Hearing begun. Hearing cont'd to 7-25-73 at 1 P.M. | | |
| 5-73 | Before JUDD, J. - Case called. Attys for both sides present. Hearing continued. Hearing concluded. Decision reserved. | | |
| 5-73 | Affidavit of Michael A. Bell in support of pltffs' motion for a preliminary injunction, etc. filed. | | 87 |
| 3-73 | Pltff's Memorandum in support of motion for preliminary injunction filed. | | 88 |
| 9-73 | Stroup's transcript dtd 7-25-73 filed. | | 89 |
| -73 | Pltff's Interrogatories filed. | | 90 |
| 26/73 | Notice of Motion for an order granting pltffs Michael A. MCLAUGHLIN and D. MINNIS permission to enter Brooklyn, House of Det. , etc. filed, ret. Nov. 2, 1973 | | 91 |
| 2-73 | Before JUDD, J. - Case called & adj'd to 11-9-73. | | |
| 5-73 | Notice of cross motion ret. 11-9-73 for an order to amend order of Judge Weinstein dtd 8-16-72, etc. filed. | | 92 |
| 3-73 | Affidavit of Edward /weinreuch filed. | | 93 |
| 8-73 | Notice of motion for an order allowing Michael McLaughlin and David Minnis entry into the Brooklyn House of Detention for Men, etc. ret 11-9-73 filed. | | 94 |
| 9/73 | Before JUDD, J.- Case called- Attys for both sides present- Motion argued- Decision reserved. | | |
| 15-73 | By JUDD, J. - Memorandum and order dtd 11-14-73 that pltff's motion is granted to extent of permitting Michael A. McLaughlin and David A. Minnis to confer as visitors, but not as counsel, etc. filed | | 95 |
| 21-73 | Record on appeal received from C of A. Acknowledgment mailed to Clerk. | | |
| 26-73 | Pltff's first notice of deposition filed. | | 96 |
| 7-74 | By JUDD, J. - Memorandum of decision dtd 3-7-74 that the Court will grant a preliminary injunction, etc. filed. (see order). Settle order on three days'notice. | | 97 |
| 8-74 | Report from D.A. Kings County re Supreme Court Backlog filed. | | 98 |
| -8-74 | By JUDD, J - Supplemental memorandum dtd 3-8-74 re analysis of Supreme Court Backlog filed. | | 99 |

720-898 WALLACE, et al vs. KERN, et al
CIVIL DOCKET

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUNT REPORTER'S EMOLUMENTS RETURN |
|---|---|---|---|---|
| 3-27-74 | By JUDD, J. - Order dtd 3-22-74 granting preliminary injunction, etc. filed. | | 100 | |
| 3-28-74 | By JUDD, J. - Order dtd 3-27-74 re posting of Spanish translation of order dtd 3-26-74 filed. | | 101 | |
| 3-29-74 | Notice of appeal filed. Duplicate mailed to C of A. | | jn 102 | |
| 3-29-74 | Before JUDD, J. - Case called for hearing on deft's motion for a stay on court's order of 3-26-74. Attys for both sides present. Motion argued. Motion granted to the extent of a stay to 4-3-74 for the distribution of notice. | | | |
| 4-4-74 | Record on appeal certified & mailed to C of A | | | |
| 4/5/74 | Stenographer's transcript of 3/29/74 filed. | | 103 | |
| 4/29/74 | Before JUDD, J.--Case called. Adjd to 6/3/74 for trial | | | |
| 5/6/74 | Letter dated 5/3/74 filed from A. Bronstein to Hillel, Hoffman | | 104 | |
| 6-3-74 | Before JUDD, J. - Case called. Adjd. to 6-11-74 @ 9:30 A.M. for conference. | | | ----- |
| 6-11-74 | Before JUDD, J. - Case called. Pre-trial conference held & concluded. Trial set for 7-22-74 at 10 A.M. for trial. | | | |
| 7/3/74 | Pltff's Memorandum of Law in Support of Third Cause of Action filed. | | 105 | |
| 7-10-74 | Pltff's memorandum of law in support of seventh cause of action filed. | | 106 | |
| 7-17-74 | Defts' pre-trial memorandum of law in opposition to pltffs' third-and seventh causes of action filed. | | 107 | |
| 7-23-74 | By JUDD, J. - Writs of habeas corpus ad testificandum issued for Keith Ryan, Pedro Monges, and Leo H. Johnson ret 7-24-74 at 2:30 P.M. | | | |
| 7-24-74 | Stenographer's transcript filed | | 108 | |
| 7-25-74 | Before JUDD, J. - Case called. Both Sides present. Trial ordered and begun. Trial continued to 7-29-74. | | | |
| 7-29-74 | Writ returned and filed/not executed as to Michael D'Orio. | | 109 | |
| 7-29-74 | Before JUDD, J. - Case called. Both sides present. Trial resumed Trial cont'd to 7-30-74 @ 10 A.M. | | | ---- |
| 7-30-74 | Before JUDD, J. - Case called. Both sides present. Trial resumed. Trial com't to 7-31-74 @ 10 A.M. | | | ----- |
| 7/31/74 | Before JUDD, J. - Case called- Both sides present-Trial resumed-Pltff rests-Deft's motion to dismiss argued-Motion denied-Trial cont'd to 9/13/74 | | | |

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| TE | FILINGS—PROCEEDINGS | CLERK FEES: ISSUANCE | CLERK FEES: EXTENSION | AMOUNT RECEIVED IN ENFORCEMENT PROCEEDINGS |
|---|---|---|---|---|
| 4 | Stenographers Transcripts dated 7-25-74, 7-29-74 and 7-30-74 filed | | | 110, 111, 112 |
| 74 | Writ returned & filed/executed(SUMPTER) | | | 113 |
| 74 | Writ returned & filed/executed (STUBBS) | | | 114 |
| 74 | Writ returned & filed/executed(MC COY) | | | 115 |
| 74 | Writ returned & filed/executed (DONALD) | | | 116 |
| 74 | Writ returned & filed/executed (TURNER) | | | 117 |
| 74 | Writ returned & filed/executed (HUNDLEY) | | | 118 |
| 74 | Writ returned & filed/executed (FOY) | | | 119 |
| 74 | Writ returned & filed/executed (DONALD) | | | 120 |
| 74 | Writ returned & filed/executed (MONGES) | | | 121 |
| 74 | Writ returned & filed/executed(RYAN) | | | 122 |
| 74 | Writ returned & filed/executed(JOHNSON) | | | 123 |
| 74 | Writ returned & filed/executed (BURRUS) | | | 124 |
| 3-74 | Copy of writ returned and filed/executed as to Donald McCoy. | | | 125 |
| )-74 | Copy of writ returned and filed/executed as to Ronald Sumpter. | | | 126 |
| )-74 | Certified copy of judgment and copy of opinion received from C of A reversing order of district court which permitted demand for trial by jury after 6 months pretrial incarceration. | | | 127 |
| -74 | By JUDD, J.--Five writs of habeas courpus ad testaficandum issued. | | | == |
| -74 | By JUDD, J.--Writ of habeas corpus ad testaficandum for Randolph Jenkins issued. | | | == |
| /74 | Letter dated Sept. 10, 1974 filed from T. Baker to Clerk of the court | | | 128 |
| /74 | Copy of letter dated Sept. 13, 1974 filed from S. Alvisky to T. Baker | | | 129 |
| /74 | Before JUDD,J.- Case called- Both sides present-Trial resumed-Trial cont'd to 9/13/74 | | | |
| -74 | Writ returned & filed/Executed (Daniel Turner) | | | 130 |
| -74 | Writ returned & filed/Executed (Wilbert Donald) | | | 131 |
| -74 | Writ returned & filed/Executed (Randol[illegible] Jenkins) | | | 132 |
| -74 | Writ returned & filed./Executed (Leo H. Johnson) | | | 133 |
| -74 | Before JUDD, J.--Case called. Both sides present. Trial resumed. Trial cont'd to 9-20-74 at 11:30 a.m. | | | |
| 74 | Before JUDD,J.- Case called- Both sides present-Trial resumed-Deft rests-Trial cont'd to 10/18/74 | | | |
| -74 | By JUDD, J. - Writ of habeas corpus ad testificandum issued for Wilbert Donald, ret 10-18-74 at 2 P.M. | | | |

72C-898 WALLACE, et al vs. KERN, et al

CIVIL DOCKET

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---|---|---|---|---|
| 10-8-74 | Letter from John M. Brickman dtd 10-4-74 with annexed copy of brief of NYC Board of Correction as Amicus Curiae filed. | | | 134 |
| 10/15/74 | Stenographer's transcript of July 31, 1974 filed. | | | 135 |
| 10/17/74 | Stenographer's transcript of Sept. 20, 1974 filed. | | | 136 |
| 10/18/74 | Affidavit of Arthur N. Read filed. | | | 137 |
| 10-18-74 | Before JUDD, J-Case called. Both sides present. Trial resumed. Trial concluded, decision reserved. | | | |
| 10-22-74 | Copies of writs returned and filed/executed as to Albert Smalls and Morissel McNair, | | | 138/139 |
| 10-25-74 | By JUDD, J. - Writs issued as to Wilbert Donald & Daniel Turner ret 11-1-74. | | | |
| 10-30-74 | Stenographer's transcript of 9-13-74 filed. | | | 140 |
| 10-31-74 | Writ returned and filed/executed as to Wilbert Donald. | | | 141 |
| 11/1/74 | Affidavit of John Boscon filed. | | | 142 |
| 11/1/74 | Affidavit of James V. Thompson filed. | | | 143 |
| 11/1/74 | Affidavit of A. Michael Weber filed. | | | 144 |
| 11/1/74 | Affidavit of John Boston filed. | | | 145 |
| 11/1/74 | Before JUDD, J.- Case called- Both sides present-All sides sum up-Trial concluded-Decision reserved. | | | |
| 11/4/74 | Writ of Habeas Corpus Ad Testificandum filed. Unexecuted. | | | 146 |
| 11-6-74 | Stenographer's transcript dated 9-18-74 filed. | | | 147 |
| 11/7/74 | Stenographer's transcript of Oct. 18, 1974 filed. | | | 148 |
| 12-6-74 | Memorandum of law in support of pltffs' motion for permanent relief filed. | | | 149 |
| 2-14-75 | Brief for the Legal Aid Society Amicus Curiae filed. | | | 150 |
| 2-18-75 | By JUDD, J.-Memorandum and Decision dtd 2-14-75 re~~xxxx

| FILINGS—PROCEEDINGS | CLERK'S FEES | | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---|---|---|---|
| | PLAINTIFF | DEFENDANT | |
| 7-75 Notice of Appeal filed. Copy sent to C of A. JT | | | 155 |

D. C. 106 **73C 55** CONSOLIDATED WITH 72C 898

DOCKET

TITLE OF CASE

APPEAL

JUDD, J.

ATTORNEYS

UNITED STATES OF AMERICA, EX REL.,
MICHAEL A. MCLAUGHLIN-KENNETH J. STONE, JR.,
RICHARD WASHINGTON-MICHAEL DI'ORIO,
WILLIAM HAYES,

-PLAINTIFFS-

-AGAINST-

THE PEOPLE OF THE STATE OF NEW YORK;
THE PEOPLE OF THE CITY OF NEW YORK;
THE CHIEF PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK; AND ALL ASSOCIATE JUDGES OF THE STATE OF NEW YORK;
NATHAN SELKIN, CHIEF CLEPK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT; JOESPH PARISI, CHIEF CLERK, SUPREME COURT, STATE OF NEW YORK;
THE LEGAL AID SOCIETY, OF THE CITY OF NEW YORK; GEORGE SPANAKOS, ADMINISTRATOR, STATE OF NEW YORK, COUNTY OF KINGS,

-DEFENDANTS-

*For Plaintiffs* Pro Se
275 Atlantic Ave
Brooklyn, N.Y. 11201

*For Defendant:*
Atty General State N.Y
80 Centre St NYC 1001
488-3289

| ACCOUNT | RECEIVED | | DISBUR |
|---|---|---|---|
| 1) Legal Aid Soc | 5 | - | |
| | | | 5 |
| 2) Attorney General | 5 | - | |
| 2) N.Y. State | | | 5 |

ABSTRACT OF COSTS

| TO WHOM DUE | AMOUNT |
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RECEIPTS, REMARKS, ETC.

730



| DATE | PROCEEDINGS | AMOUNT REPORTED IN DOCUMENT RETURNS | |
|---|---|---|---|
| 11-73 | Complaint filed. | 1 | JS |
| 26-73 | By JUDD,J. - Order dtd 2-23-73 extending deft's time to answer twenty days.filed. | 2 | |
| 20-73 | ANSWER filed. | 3 | |
| 2-73 | Notice of motion to dismiss complaint filed in 73C-113. | == | |
| )-73 | By JUDD, J. - Memorandum and order dtd 4-6-73 that the motion to dismiss the complaint be denied, that defts' time to answer the complaints is extended to 4-12-73, etc. filed in 73C-113. | == | |
| 3/73 | Before Judd,J.-Case called for p/t conf.-Attys for both sides present-Case cont'd to 4/16/73 at 10:00AM | | |
| 16-73 | Before JUDD, J. - Case called for hearing on insufficiency of representation of Legal Aid Society in State Courts. Pltffs' pro se present. Atty for defts present. Pltff rests. Defts motion to dismiss. Motion denied. Case adj'd to 4-18-73 at 10 A.M. | | |
| 18-73 re | Before JUDD, J.-Case called for hearing on insufficiency of representation of Legal Aid Society in State Courts. Attys for both sides present. Hearing continued.Case cont'd to 4-19-73 at 10 A.M. | | |
| 19/73 | Before Judd,J-Case called for hearing on pltffs. motion for preliminary injunction-Pltffs. present-Attys for both sides present-Hearing on motion for preliminary injunction cont'd-Hearing cont'd to 4/30/73 at 10AM-Both sides to submit further papers by 4/26/73 | | |
| 1/73 | Before Judd,J.-Case called-Attys for both sides present-Hearing cont'd-Pltffs. motions to consolidate above cases with 72C898. (Wallace vs. Kern)-Motion argued-Decision reserved-Hearing concluded-Decision reserved | | |
| /73 | Stenographers transripts dtd. 4/30/73 filed. | 4 | |
| 1/73 | Affidavit of Robert Kasanof & Memorandum of the Criminal Defense Div. of the Legal Aid Society filed. | 5/6 | |
| 4-73 | Memorandum in support of motion for preliminary injunction filed. | 7 | |
| 10-73 | By JUDD, J. - Memorandum dtd 5-10-73 filed in 72C-898. | -- | |
| 10-73 | By JUDD, J. - Order dtd 5-10-73 for a preliminary injunction against the Clerk of the Supreme Court, Kings County and the Legal Aid Society of the City of New York, etc. filed in 72C-898. | | |

page 3 U.S.A. EX REL: Michael A. McLaughlin, et al vs PEOPLE OF N.Y., et
73C-55
CIVIL DOCKET

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUNT RECEIVED EMOLUMENT RETURN |
|---|---|---|---|---|
| 5-18-73 | Before JUDD, J. - Case called. Attys for all sides present. Motions for modification of court order argued. Decision reserved. | | | |
| 5/22/73 | Post-hearing brief for deft. state judges and court personnel filed in 73C113. | | | |
| 5/23/73 | By Judd,J.-Supplemental order dtd. 5/22/73 relating to preliminary injunction filed in 72C898. | | | |
| 5/25/73 | Notice of appeal filed. | | | 8 |
| 5/25/73 | Record on appeal certified and handed to Sandy, Sadowitz for delivery to the C of A. | | | |
| 5-29-73 | Notice of appeal filed by atty General State of N.Y. Copy mailed to C of A. | | | 9 |
| 6-4-73 | Acknowledgment received from C of A for receipt of record on appeal and filed. | | | 10 |
| 6-4-73 | By JUDD, J. - Memorandum and order dtd 5-29-73 consolidating action filed in 72C-898. (see order). | | | |
| 7-3-73 | Copy of judgment received from C of A reversing order of this court and filed. jn | | | 11 |
| 12-21-73 | Record on appeal received from C of A. Acknowledgment mailed to Clerk. | | | |
| 2-18-75 | By JUDD, J.-Memorandum and Decision dtd 2-14-75 re directing Clerk to enter judgment and dismissing the complaint filed. See Order. See 72C 898 doc. #61 | | | -- |
| 3-26-75 | By JUDD, J.-FINAL JUDGMENT ORDER AND DECREE dtd 3-25-75 filed in 72C 898. | | | -- |
| 3-26-75 | By JUDD, J.-Order dtd 3-25-75 denying motion to stay the final judgment except as incicated filed in 72C 898. | | | -- |
| 3-26-75 | Letter from Stanley L. Kantor dtd 3-24-75 re objection to pltff's proposed order filed in 72C 898. | | | -- |
| | ALL FURTHER ENTRIES TO BE MADE ON 72C 898 | | | |

73 C 113

DOCKET

JUDD, J.

MICHAEL A. MCLAUGHLIN-RICHARD WASHINGTON, KENNETH J. STONE, JR.-GREGORY WILLIAMS, PETER GRAFAKOS-EDWIN REYES-CARL SMITH, DARRIE PETERS-MICHAEL DI'ORIO-OTIS WINDLEY, WALTER JOHNSON, ON BEHALF OF THEMSELVES, AND ALL OTHERS SIMILARLY SITUATED, WHO HAVE MATTERS PENDING IN THE CRIMINAL TERM OF THE SUPREME COURT, OF THE STATE OF NEW YORK, COUNTY OF KINGS,

PLAINTIFFS,

-AGAINST-

THE PEOPLE OF THE STATE OF NEW YORK; THE PEOPLE OF THE CITY OF NEW YORK; THE CHIEF PRESIDING JUSTICE, OF THE SUPREME COURT, OF THE STATE OF NEW YORK; AND ALL ASSOCIATE JUDGES OF THE STATE OF NEW YORK; THE LEGAL AID SOCIETY, CRIMINAL DEFENSE DIVISION, OF THE CITY, AND STATE, OF NEW YORK; THE NEW YORK STATE ADMINISTRATOR, COUNTY OF KINGS,

DEFENDANTS,

ATTORNEYS

*For Plaintiff:* Pro Se
Michael Mclaughlin et
275 Atlantic Ave
Bklyn, N.Y. 11201

*For Defendant:* For L.A.S.: J
M. Wall, 36 W 44th St.
NYC 10036 986-6688
for deft Judges & pers
Atty General State N.Y
80 Centre Street NYC 1
488-3289

| EFENDANT'S ACCOUNT | RECEIVED | | DISBU |
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| ...d Appeal to Trial | Legal A.d Society | 5 | — | 5 |
| ...e of Appeal to Trial | Pattern Jury Inst. | 5 | — | 5 |

ABSTRACT OF COSTS

| TO WHOM DUE | AMOUNT |
|---|---|

RECEIPTS, REMARKS, ETC.

| DATE | FILINGS PROCEEDINGS | AMS REPORT EMOLU RET |
|---|---|---|
| 23-73 | Complaint filed. | 1 |
| 31-73 | Summons issued as to The City of New York; Hon. John E. Cone, Chief Presiding Justice Sup/Ct State of N.Y.; The Legal Aid Society; Herman M. Pogul. Director of Administration of the Courts. | |
| -9-73 | Summons returned and filed/unexecuted as to Herman M. Pogul. | 2 |
| -14-73 | Motion for an omnibus of court orders filed. | 3 |
| /28/73 | Notice of appearance for deft L.A.S. filed | 4 |
| -28-73 | By JUDD, J. - Order dtd 2-27-73 extending deft's time to answer to 3-19-73 filed. | 5 |
| 3-20-73 | ANSWER filed. | 6 |
| 3-73 | By JUDD,J.-Writ issued ret. 3-29-73 at 10:30 AM (Michael A. McLaughlin and Kenneth Stone, Jr. ) | |
| 3-29-73 | Before JUDD, J. - Case called. - Pretrial conference held and concluded. Hearing set for 4-16-73. - Hearing held on application for habeas corpus (Michael McLaughlin & Kenneth Stone,Jr. present). Decision reserved pending word on whether trial of above petitioners proceeds in the state courts on 4-2-73. | |
| -2-73 | Notice of motion to dismiss complaint filed(judge to set date). | 7 |
| -3-73 | By JUDD,J.-Writ issued re: McLaughlin ret. 4-6-73. | |
| 4-3-73 | Stenographer's transcript dtd 3-29-73 filed. | 8 |
| 4-6-73 | Before JUDD, J. - Case called for hearing on motion to dismiss. Attys for both sides present. Deft Legal Aid's motion to dismiss argued. Motion denied. Legal Aid Society to answer by 4-12-73 at 10 A.M. for further hearing on pltffs' motion for preliminary injunction. | |
| 4-6-73 | Letter from Michael McLaughlin to Judge Judd dtd 4-5-73 filed. | 9 |
| 4-9-73 | By JUDD, J. - Memorandum and order dtd 4-6-73 that the motion to dismiss the complaint be denied, that defts' time to answer the complaints is extended to 4-12-73, etc. filed. | 10 |
| -10-73 | By JUDD,J.-Writ issued ret. 4-16-73 as to defts McLaughlin, Di'Orio and Stone. | |
| 4-12-73 | ANSWER of Legal Aid Society filed. | 11 |
| 4-12-73 | Stenographer's transcript dtd 4-6-73 filed. | 12 |
| 4/13/73 | Before Judd,J.- Case called for p/t conf.-Attys for both sides present-Case cont'd to 4/16/73 at 10:00 AM | |

continued

Page 3 MCLAUGHLIN, et al -vs- THE PEOPLE OF NEW YORK STATE, et al 73C-1

CIVIL DOCKET

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT | AMOUNT RECORDED IN EMOLUMENT RETURNS |
|---|---|---|---|---|
| 4-16-73 | Before JUDD, J- Case called for hearing on insufficiency of representation of Legal Aid Society in State Courts. Pltffs pro se present. Atty for defts present. Pltff rests. Defts' motion to dismiss. Motion denied. Case adj'd to 4-18-73 at 10 A.M. | | | |
| 4-18-73 | Before JUDD, J.--Case called for hearing on insufficiency of representation of Legal Aid Society in State Courts. Attys for both sides present. Hearing held and case cont'd to 4-19-73 at 10 A.M. | | | |
| 4/19/73 | Before Judd.J.-Case called for hearing on pltffs. motion for preliminary injunction-Pltffs. present-Attys for both sides present-Hearing on motion for preliminary injunction cont'd-Hearing cont'd to 4/30/73 at 10 AM-Both sides to submit further papers by 4/26/73 | | | |
| 4-25-73 | By JUDD,J.-Writs issued as to ~~defxxpltffs~~ McLaughlin & Stone ret. 4-30-73- | | | |
| 4/30/73 | Before Judd,J.-Case called-Attys for both sides present-Hearing cont'd-Pltffs motions to consolidate above cases with 72C898 (Wallace vs.Kern)-Motion argued-Decision reserved-Hearing concluded-Decision reserved. | | | |
| 5/1/73 | Stenographers transcripts dtd. 4/30/73 filed in 73C55 | | -- | |
| 5/1/73 | Affidavit of Robert Kasanof & memorandum of the Criminal Defense Div. of the Legal Aid Society filed in 73C55. | | -- | |
| 5-4-73 | Memorandum in support of motion for preliminary injunction filed in 73C-55. | | -- | |
| 5-10-73 | By JUDD, J.- Memorandum dtd 5-10-73 filed in 72C-898. | | -- | |
| 5-10-73 | By JUDD, J. - Order dtd 5-10-73 for a preliminary injunction against the Clerk of the Supreme Court, Kings County and the Legal Aid Society of the City of New York, etc. filed in 72C-898. | | -- | |
| 5-17-73 | By JUDD,J.-Writ issued as to Michael McLaughlin ret. 5-18-73. | | | |
| 5-18-73 | Before JUDD, J. - Case called. Attys for all sides present. Motions for modification of court order argued. Decision reserved. | | | |
| 5/22/73 | Writ returned and filed/executed. | | 73 | |
| 5/22/73 | Post-hearing brief for defts. state judges and court personnel filed. | | 14 | |

| DATE | PROCEEDINGS | PLAINTIFF | DEFENDANT | AMOUNTS REPORTED IN EMOLUMENT RETURNS |
|---|---|---|---|---|
| 23/73 | By Judd,J.-Supplemental order dtd. 5/22/73 relating to preliminary injunction filed in 72C898. | | | -- |
| -25-73 | Stenographer's transcripts dtd April 16,18&19 filed. | | | 15/16/17 |
| 25-73 | Notice of appeal filed. | | | 18 |
| -25-73 | Record on appeal certified and handed to Sandy Sadowitz for delivery to the Court of Appeals. | | | |
| 29-73 | Notice of appeal filed by Atty General State of N.Y.-Copy mailed to C of A. | | | 19 |
| 4-73 | Acknowledgment received from C for receipt of record on appeal and filed. | | | 20 |
| 4-73 | By JUDD, J. - Memorandum and order dtd 5-29-73 granting consolidation filed in 72C-898. (see order). | | | -- |
| -3-73 | Copy of order received from C of A reversing order of this court and filed. jn | | | 21 |
| -21-73 | Record on appeal received from C of A. Acknowledgment mailed to Clerk. | | | |
| -18-75 | By JUDD, J.-Memordum and Decision dtd 2-14-75 re directing Clerk to enter judgment and dismissing the complaint filed (See Order) (p/c mailed) Filed in 72C 893 doc. #151 | | | --- |
| -26-75 | By JUDD, J. - FINAL JUDGMENT ORDER AND DECREE dtd 3-25-75 filed in 72C-898 | | | --- |
| -26-75 | By JUDD, J. - Order dtd 3-25-75 denying motion to stay the final judgment except as indicated filed in 72C-898. | | | --- |
| -26-75 | Letter from Stanley L. Kantor dtd 3-24-75 re objection to pltff's proposed order filed in-72C-898. | | | --- |
| -28-75 | Notice of Appeal filed. Copy sent to C of A. See 72C 898 document #155. | | | --- |

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'73 JAN 24 PM 4:43
DEPT. OF LAW
STATE OF N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD WALLACE, MAURICE HUNDLEY, ALGIE McGILL, WILBERT DONALD, BARRY WILSON, RANDOLPH JENKINS, RUDOLPH BROWN, JOHN CORLEY, JAMES BROWN, DAVID MINNIS, DONALD McCOY, WILLIAM McDONALD, OLIVER STEWART, LAWRENCE GURLEY, DANIEL MINERVA and "RICHARD ROE," on behalf of themselves and all others similarly situated,

Plaintiffs,

- v -

MILES F. McDONALD, MICHAEL KERN, JAMES S. BROWN, THOMAS E. MORRISSEY, JR., OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, BEATRICE M. JUDGE, ABRAHAM J. MULTER, WILLIAM T. COWIN, MAURICE BERNHARDT, HARRY GITTLESON, S. REYMART ALLER, JOHN R. STARKEY, HYMAN BARSHAY, MURRAY H. PEARLMAN, CARMINE A. VENTIERA, J. BETRAM WEGMAN, DOMINIC S. RINALDI, J. COURTNEY McGROARTY, MURRAY T. FEIDEN, CHARLES J. BECKINELLS, SIMON J. LIEBOWITZ, ANTHONY J. DiGIOVANNA, LOUIS B. HELLER, HAROLD J. McLAUGHLIN, AARON E. KOOTA, GEORGE H. NICOLS, FRANK J. PINO, FRANK S. SAMANSKY, JOSEPH R. CORSO, JOHN E. CONE, THEODORE G. BARLOW, IRWIN BROWNSTEIN, JOHN A. GARBARINO, THOMAS R. JONES, GUY J. MANGANO, MILTON MOLLEN, FRANKLIN W. MORTON, JR., VITO J. TITONE, A. DAVID BENJAMIN, FRANK COMPOSTO, ARTHUR J. HIRSCH, ABRAHAM J. KALINA, IRVING P. KARTELL, ALBERT S. McGROVER, M. HENRY MARTUSCELLO, JOHN A. MONTELEONE, CHARLES R. RUBIN and JOSEPH M. SOVIERO, individually and as Justices of the Supreme Court of the State of New York, Kings County; VINCENT D. DAMIANI, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; BENJAMIN MALCOLM, individually and as Commissioner of Corrections of the City of New York; CHARLES FASTOV, individually and as Chief Probation Officer of Kings County; JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County;

Defendants.

NO. 72 C 893

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

## JURISDICTION

1. This is an action for declaratory and equitable relief pursuant to the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983 et seq., the Declaratory Judgment Act, 28 U.S.C. Sec. 2201-2202, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction arises under 28 U.S.C. Sec. 1331, 1343(3) and 1343(4).

## PARTIES

### Plaintiffs

2. Plaintiffs Donald Wallace, Maurice Hundley, Algie McGill, Wilbert Donald, Barry Wilson, Randolph Jenkins, Rudolph Brown, John Corley, James Brown, David Minnis, Donald McCoy, William McDonald, Iliver Stewart, Lawrence Gurley, Daniel Minerva, and "Richard Roe," the latter's identity being presently unknown, are indigents who have been or will be arrested, charged with and indicted for alleged commission of felonies in the State of New York, Kings County, under the New York Penal Law. Each is assigned counsel by defendant justices -- usually an attorney from the Legal Aid Society or else private counsel assigned pursuant to Section 18(b) of the County Law of the State of New York. Plaintiffs have been or will be made to suffer pre-trial incarceration in the Brooklyn House of Detention or other institution under the care, custody and control of the New York Department of Corrections, for from six months to two years or more. This long incarceration results and will result from defendant justices setting bail in an amount each plaintiff has been or will be unable to meet or because defendant justices have ordered or will order plaintiffs held

without bail. Plaintiffs are typical of all indigents who have or will have matters pending in New York Supreme Court, Kings County. They sue on their own behalf and on behalf of all other persons who are or will be similarly situated.

Defendants

3. Defendant justices are Justices of the New York Supreme Court, Kings County. Defendant Vincent D. Damiani is the Administrative Judge of the Kings County Supreme Court and is responsible for supervising and administering the operation of that Court. Defendant Eugene Gold is the District Attorney for Kings County. He and his staff are responsible for the representation of the State of New York in all criminal matters arising in New York Supreme Court, Kings County. These defendants are duly elected to their respective positions and their rights, powers and duties encompass the prosecution and processing of criminal defendants through the judicial system in Kings County. Defendant Joseph Mangano is the Chief Clerk of the Kings County Supreme Court. On information and belief, Mangano is responsible for maintaining all files, records and administrative data in Supreme Court, Kings County. Defendant Joseph Parisi is the Chief Clerk of the Criminal Term of Supreme Court, Kings County. On information and belief, Parisi's duties include processing, evaluating and answering pro se petitions submitted by criminal defendants and the administration and supervision of the clerical staff and supportive staff of the Supreme Court. Defendant Malcolm is the Commissioner of Corrections for New York City. He is responsible for supervising the operation of the Brooklyn

House of Detention and all other institutions under the care, custody and control of the New York City Department of Corrections. Defendant Charles Fastov is head of the Probation Department in Kings County. His duties include the preparation and submission to the Court of presentencing reports.

The defendants are sued individually and in their official capacities as those responsible for the procedural workings of the Criminal Justice System in Kings County. At all times herein, defendants have acted and will continue to act under color of state law, custom and/or practice.

CLASS ACTION

4. This is a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. It is brought on behalf of all indigents who will be or have been arrested for, charged with and indicted for the alleged commission of felonies under the Penal Law of New York in Kings County, New York, who will be or have been assigned counsel and who will be or have been subjected to lengthy periods of pre-trial incarceration because of their inability to raise bail. From January 1, 1969 through September 1, 1972, there have been approximately 25,000 felony indictments in Brooklyn. The class is therefor so numerous as to make joinder of all members impracticable; there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class. Defendants have acted and refused to act and will continue to act, and to refuse to act, on grounds generally applicable to

the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

LAS

FIRST CAUSE OF ACTION

5. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-4.

6. There exists a severely overcrowded and congested condition in New York Supreme Court, Kings County.

7. On information and belief, attorneys from the Legal Aid Society are assigned as counsel in over ninety (90%) per cent of all cases therein in which a defendant is indigent. There is placed upon counsel assigned to represent plaintiffs a caseload of staggering proportions which precludes giving to plaintiffs' cases the attention and work that is constitutionally required. By assigning an overwhelming number of cases to Legal Aid, defendant justices have made it impossible for individual Legal Aid attorneys to adequately investigate, prepare and try plaintiffs' cases and to otherwise adequately represent plaintiffs.

8. The resultant lack of effective assistance of assigned counsel afforded plaintiffs includes but is not limited to:

(a) failure to object to the district attorney's failure to notify plaintiffs that their cases are being presented to the grand jury for indictment;

(b) failure to notify each plaintiff of his right to appear before the grand jury to which his case has been

presented and to request the calling before that grand jury of witnesses who could and would testify on behalf of plaintiffs;

(c) failure to counsel plaintiffs before and during such appearances;

(d) failure to challenge the selection, composition and actions of the grand jury;

(e) failure to conduct adequate pre-trial investigation of the facts of each case through consultation with plaintiffs and through independent investigation either on the attorney's own or by way of a competent investigator appointed pursuant to Section 18(b) of the County Law of the State of New York;

(f) failure to consult adequately with plaintiffs individually as to the facts and law of their respective cases so as to enable plaintiffs to make a knowing and intelligent decision as to whether or not to plead guilty and on what terms;

(g) failure to seek reduction of excessive bail set for plaintiffs while they are awaiting trial (thus denying plaintiffs the right to reasonable bail and, also, precluding them from being able to assist in the preparation of their respective cases as, e.g., by finding and interviewing witnesses);

(h) failure to file pre-trial and post-trial motions appropriate to and warranted by the facts of plaintiffs' respective cases;

(i) failure to conduct adequate investigation into facts necessary to adduce in support of pre-trial and post-trial motions;

(j) failure to demand in the trial court an early trial or, alternatively, dismissal of charges where a speedy trial is denied;

(k) failure to insist upon plaintiffs' right to be present at every court proceeding involving their respective cases;

(l) failure to challenge the refusal to allow plaintiffs to file motions pro se;

(m) failure to take interlocutory appeals of the denial of pre-trial motions where such appeals are permitted under New York law;

(n) failure to prepare for legal issues that will arise during trial (particularly evidentiary questions) so as to be able to make appropriate objections and offer otherwise admissable evidence during trial;

(o) failure to adequately seek to adduce at trial all the facts that would support plaintiffs' cases;

(p) failure to apprise plaintiffs of the various actions taken by the court at each stage of their respective cases and failure to adequately explain to plaintiffs those actions;

(q) failure to raise on appeal the non-frivolous issues that arise in plaintiffs' cases (including the ineffective assistance of counsel below).

Plaintiffs will thereby be and are denied the right to prepare for and obtain their day in court and the right to effective assistance of counsel in violation of the Fifth and Sixth Amendments to the United States Constitution.

SECOND CAUSE OF ACTION

9. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-4 and 8.

10. Defendants routinely and systematically deny plaintiffs their right to a speedy trial (a) by failing to promptly present cases to the grand jury after having been held for the grand jury by action of the Criminal Court or by failing to order prompt presentation; (b) by failing to bring cases to trial promptly and within the time prescribed by law; and (c) in the case of the Probation Department, by taking an average of three to four months to complete pre-pleading and pre-sentencing investigations.

11. Plaintiff Wilson's case is representative of how defendants routinely fail to timely indict those arrested for alleged commission of a felony. Forty-seven (47) days after his case was held for the grand jury and while still incarcerated, he submitted a writ of habeas corpus to the court requesting release on his own recognizance pending indictment on the ground that the grand jury had not indicted him. On information and belief, defendant Gold, through his subordinates, requested and obtained an adjournment. The writ was eventually heard and granted eighteen (18) days later; thus, plaintiff was illegally detained for at least twenty (20) days. In spite of the release order, he remained incarcerated until arraignment some twenty (20) days later when excessive bail was set.

12. On information and belief, plaintiffs routinely are compelled to languish in jail for periods of from six months to two years or more before they are tried, and, if convicted,

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sentenced. The following situations are representative of plaintiffs' cases generally:

(a) Wilbert Donald was arrested in April, 1971; he is still awaiting trial; (b) Lawrence Gurley was arrested in March, 1971, but did not go to trial until March, 1972. He was not sentenced until September, 1972; (c) Randolph Jenkins was arrested in October, 1970, and was not tried until April, 1972; he has not yet been sentenced; (d) James Brown arrested in August, 1971. He has not yet been tried because of repeated adjournments requested by the defendant Gold. A motion to dismiss for lack of prosecution has been denied by a defendant justice.

13. The lengthy delays in plaintiffs' cases, which are not attributable to plaintiffs but which impair the preparation of their respective defenses and otherwise prejudice plaintiffs, violate and will violate their right to a speedy trial under the Sixth and Fourteenth Amendments to the Untied States Constitution.

THIRD CAUSE OF ACTION

14. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-4 and 8.

15. Defendant Gold and defendant justices, respectively, recommend against and deny plaintiffs release on their own recognizance where no imposition of monetary conditions could reasonably be thought necessary to assure plaintiffs' respective reappearances in court. The same defendants recommend the denial of and deny bail, respectively, in circumstances where

the denial of bail is unnecessary to assure plaintiffs' reappearance. Defendants urge and set bail, respectively, without regard to plaintiffs' respective financial situations.

The following are representative of the class of plaintiffs generally: in the cases of Donald Wallace, Maurice Hundley, Randolph Jenkins, Donald McCoy, James Brown, David Minnis and Oliver Stewart, on arraignment after indictment, bail was set at amounts which indigents could not conceivably post. In the cases of Maurice Hundley and James Brown, after indictment bail was raised from the amount set in the lower court even though plaintiffs remained incarcerated because they could not make even that lower bail. Algie McGill and Wilbert Donald, held by the lower court on $10,000 and $5,000 bail, respectively, are now held without bail. Bail review motions were filed by Jenkins, Brown, McDonald, Stewart, Minnis, Donald and McGill and were denied except that bail on one of Jenkins' indictments was reduced from $15,000 to $5,000. He is still incarcerated on a total of $17,000 bail.

16. The practices described herein violate and will violate plaintiffs' right to be free of excessive bail under the Eighth and Fourteenth Amendments to the United States Constitution.

FOURTH CAUSE OF ACTION

17. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-16.

18. By order of defendant justices, plaintiffs are and will be compelled to suffer incarceration of from six months to two years or more without having been convicted of any crime

or having any civil judgment entered against them. This incarceration takes and will take place in overcrowded jails where plaintiffs' liberty is and will be severely limited by the prison conditions and regimen ordered and administered by defendants. This lengthy incarceration causes and will cause plaintiffs to lose their employment, with the result that plaintiffs and their families suffer and will suffer severe economic and financial hardship and mental anguish during plaintiffs' incarceration and thereafter. Frequently plaintiffs' lengthy incarceration also results and will result in the breakup of plaintiffs' families and the inability of plaintiffs' children to achieve normal educational, cultural and social growth.

19. This lengthy incarceration and consequences directly attributable thereto constitute cruel and unusual punishment and a denial of equal protection and of life, liberty and property without due process of law, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION

20. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-4 and 8.

21. Because their assigned counsel are and will be unable to provide plaintiffs' cases with the legal attention they deserve, plaintiffs often find and will find it necessary to submit pro se motions to protect their rights. These motions are not otherwise made on behalf of plaintiffs by assigned counsel.

(a) Defendant Malcolm refuses and will refuse to accept such motions for filing; instead, he sends and will send a form letter to plaintiffs to the effect that the motions have been forwarded to their attorneys.

(b) On information and belief, counsel assigned to represent plaintiffs generally do not and will not submit these motions.

22. The practice of refusing to allow plaintiffs to file motions pro se in their cases in New York Supreme Court, Kings County, deprives and will deprive plaintiffs of their rights to their day in court, to access to the courts, and to counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

SIXTH CAUSE OF ACTION

23. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-4 and 8.

24. On information and belief, defendant Malcolm is charged with the responsibility for producing in court criminal defendants who are incarcerated in institutions under the care, custody and control of the New York City Department of Corrections on dates when their cases are scheduled to be heard before the defendant justices. The defendant justices are charged with the responsibility for assuring that criminal defendants are actually present in court when their cases are being heard.

25. It is and will be common practice for plaintiffs to be shuttled between the jail and the courthouse three or four times or more during the pendency of their respective cases

without seeing the inside of the courtroom. It is and will be the practice in Supreme Court, Kings County, for plaintiffs to be brought from the jails to the courthouse and lodged in detention pens in the courthouse until their respective cases are called. On information and belief, often plaintiffs' cases are and will be called and processed by the defendants while plaintiffs are sitting in the detention pens. Often they are and will be brought back to jail without having appeared in court and without having been informed by the court, the District Attorney, Department of Corrections or by their own counsel as to what occurred in the courtroom.

26. The Department of Corrections often fails and will fail to produce plaintiffs in court when they have been ordered by the defendant justices to do so, requiring cases to be unnecessarily adjourned and further adding to trial delays and the overcrowded and congested conditions in the Supreme Court.

27. Defendants' actions in unnecessarily shuttling plaintiffs from jail to courthouse and in not assuring defendants' presence in the courtroom at each stage of the proceedings in their respective cases is pervasive and continuing and violates and will violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

SEVENTH CAUSE OF ACTION

28. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-27.

29. The systematic, pervasive and continuing practices of defendants that allow secret indictments, that deny to plaintiffs the right to effective assistance of counsel or to file motions pro se, that force them to languish in jail pre-trial under economically, physically and mentally debilitating conditions for lengthy and excessive periods of time by setting unreasonable and excessive bail and refusing to assure a prompt trial (without giving any indication to plaintiffs when each will be brought to trial), that allow them to be constantly shuttled back and forth between jail and courthouse without apparent reason while failing to assure plaintiffs' presence in court at all stages of their respective cases, and the congested conditions of the calendar and the courtroom create pressure on judges, prosecutors and defense attorneys to process cases by accepting guilty pleas rather than by conducting trials. The criminal justice system is governed by the need to clear the calendar rather than considerations of the guilt or innocence of the accused.

30. The practices set forth in paragraph 1-29 are designed to have and will have the effect of intimidating, harassing and coercing plaintiffs into pleading guilty to felony charges and accepting prison sentences rather than standing trial by jury as is their constitutional right, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

31. On information and belief, defendant justices frequently intimidate, threaten, harass and coerce reluctant felony defendants in open court into pleading guilty rather

than standing trial, in violation of their Fifth, Sixth and Fourteenth Amendment rights.

indicted 5/1/70

32. Maurice Hundley's situation is typical of plaintiffs' cases generally. A letter written to the court requesting an adjournment was construed by a defendant justice as a motion for a speedy trial. He was permitted to confer with his attorney for only twenty minutes before trial. He pled guilty rather than stand trial on inadequate preparation.

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EIGHTH CAUSE OF ACTION

33. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1-32.

34. Persons who can afford to retain private counsel receive and will receive qualitatively and quantitatively better legal representation than plaintiffs. Further, such persons are and will be brought to trial more quickly, are and will be allowed to be present during all court proceedings involving their cases, are not and will not be subjected to the lengthy pre-trial incarceration suffered by plaintiffs, and are not and will not be coerced into taking guilty pleas in the way plaintiffs are. Plaintiffs are therefore and will be discriminated against because of their financial status in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

35. Non-indigent criminal defendants in New York Supreme Court, Kings County, who are otherwise in the same position as plaintiffs, vis-a-vis the criteria for setting bail, [illegible] and will be able to purchase their pretrial freedom, thus

plaintiffs, faced with the same or comparable bail, are and will be unable to do so, and are and will be forced to remain in jail before trial, all in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

36. Persons held in jail pending disposition of their cases because of their inability to make bail are and will be convicted more frequently and receive harsher sentences than those similarly situated but who have been or will be able to purchase or obtain their liberty. Accordingly, plaintiffs, who are and will be detained because of their inability to make bail, receive unequal treatment by the criminal justice system administered by defendants, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendments to the United States Constitution.

CONCLUSION

37. The conditions and actions of defendants complained of in paragraphs 1-36 are systematic, pervasive and continuing. Nevertheless, either (1) the trial attorneys assigned by defendants to represent plaintiffs fail to object to these conditions and practices; or (2) defendants routinely deny such objections -- whether oral or written; or (3) these objections are not raised in the appellate state courts by the counsel assigned to represent plaintiffs on appeal. This will often be because such attorneys do not take the time and effort to adequately apprise themselves of and raise on appeal the non-frivolous issues arising below. Institutional pressure (in the case of Legal Aid

attorneys), personal friendship with the trial attorney, and/or the fact that the appellate attorney was the trial attorney have the effect of otherwise preventing appellate counsel assigned to plaintiffs from raising on appeal the issue of the constitutional adequacy of the trial counsel assigned by defendants (as well as all related issues complained of herein). Finally, even where such issues are raised on appeal in factual situations identical or comparable to plaintiffs, they are rejected by the New York appellate courts. These conditions are existing today and are continuing.

38. Plaintiffs therefore suffer and, if not afforded relief by this Court, will continue to suffer irreparable injury to the rights ostensibly guaranteed them by the United States Constitution, for which injury there is no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. for an order directing that all persons detained in any facility under the care, custody and control of the Department of Corrections, who await trial in New York Supreme Court, Kings County, for six months or more, be released from detention and the charges against them dismissed; or, in the alternative, for an order directing release in their own recognizance of all such criminal defendants;

2. that the Court declare unconstitutional and illegal defendants' practices of denying plaintiffs effective assistance of counsel, of imposing excessive bail, denying them a speedy trial, of refusing to hear pro se motions, of forcing plaintiffs to endure pre-trial incarceration for more than six months, or

shuttling them from jail to courthouse without apparent reason, of failing to produce criminal defendants during court proceedings in their cases, of coercing guilty pleas, of discriminating against indigents in the operation of the state system of criminal justice, as in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and a violation of plaintiffs' Civil Rights as guaranteed them in 42 U.S.C. Section 1983 et seq.;

3. that the Court issue a preliminary and permanent injunction requiring defendants to accord all criminal defendants their full Fifth, Sixth, Eighth and Fourteenth Amendment rights as they are processed through the Criminal Justice System;

4. that the Court grant affirmative relief requiring the implementation by defendants of a plan developed by plaintiffs and approved by the Court for the operation and administration of the New York Supreme Court, Kings County, in accordance with the provisions of the United States Constitution, in order to assure plaintiffs' rights to effective assistance of counsel, to a speedy and fair trial, to reasonable bail, to be present during court proceedings involving their cases, to due process and equal protection of the law, and to be free from cruel and unusual punishment;

5. that this matter be advanced on the docket and the Court order a speedy hearing thereof, and upon such hearing adjudge, and declare the rights and legal relations of the parties hereto in order that such declaration shall have the force and effect of a final judgment;

6. that defendants be ordered to pay the costs of this action and reasonable attorneys' fees; and

7. for such other and further relief as to the Court may seem just and proper.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT, NEW YORK

BY MAY 15 1973
DEPART... NEW YO...

DONALD WALLACE, MAURICE HUNDLEY, ALGIE McGILL, WILBERT DONALD, BARRY WILSON, RANDOLPH JENKINS, RUDOLPH BROWN, JAMES BROWN, DAVID MINNIS, DONALD McCOY, WILLIAM McDONALD, OLIVER STEWART and LAWRENCE GURLEY on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs,

-against-

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, BEATRICE M. JUDGE, ABRAHAM J. MULTER, WILLIAM T. COWIN, MAURICE BERNHARDT, HARRY GITTLESON, S. REYMART ALTER, JOHN R. STARKEY, HYMAN BARSHAY, MURRAY H. PEARLMAN, CARMINE A. VENTIERA, J. BETRAM WEGMAN, DOMINIC S. RINALDI, J. COURTNEY McGROARTY, MURRAY T. FEIDEN, CHARLES J. BECKINELIS, SIMON J. LIEBOWITZ, ANTHONY J. DiGIOVANNA, LOUIS B. HELLER, HAROLD J. McLAUGHLIN, AARON E. KOOTA, GEORGE H. NICOLS, FRANK J. PINO, FRANK S. SAMANSKY, JOSEPH R. CORSO, JOHN E. CONE, THEODORE G. BARLOW, IRWIN BROWNSTEIN, JOHN A. GARBARINO, THOMAS R. JONES, GUY J. MANGANO, MILTON MOLLEN, FRANKLIN W. MORTON, JR., VITO J. TITIONE, FRANK COMPOSTO, ARTHUR J. HIRSCH, ABRAHAM J. KALINA, IRVING P. KARTELL, ALBERT S. McGROVER, JOHN A. MONTELEONE, CHARLES R. RUBIN, JOSEPH M. SOVIERO; individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; DAVID ROSS, individually and in his capacity as Administrative Judge of the Criminal Court of the City of New York, ALBERT S. McGROVER, JOHN J. RYAN, DONALD L. JACOBY, HOWARD B. GLIEDMAN, individual and as Judges of the Criminal Court of the City of New York, Kings County and as representative of all Justices and Judges now sitting or who may, hereafter sit in Supreme court of the State of New York or Criminal Court of the city of New York, both in Kings County;

INDEX NO.

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Supplemental Complaint to Second Amended Complaint

EUGENE GOLD, individually and as District Attorney for Kings County; BENJAMIN MALCOLM individually and as Commissioner of Correction of the City of New York; CHARLES FASTOV, individually and as Chief Probation Officer of Kings Count; JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County, JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County;

Defendants

A) Plaintiffs for their supplemental complaint pursuant to order of this Court entered March 22, 1973 incorporate by reference pars 1,2,4-6,8-14,16,17,19-34, 36-38 and the prayer for relief of the Second Amended complaint.

B) A new paragraph 4A is added and pars. 3,7,15,18 and 35 of the Second Amended Complaint are amended to read as follows:

Defendants

3. Defendant Justices are Justices of the New York Supreme Court, Kings County("Supreme Court Justices"). Defendant Vincent D. Damiani is the Administrative Judge of the Criminal Term of the Kings County Supreme Court and is responsible for supervising and administering the operation of that Court. Defendant Judges are Judges of the Criminal Court of the City of New York, Kings County. Defendant Justices and Judges are sued individually and as representative of all Justices and Judges now sitting or who may hereafter sit in the respective courts. David Ross is Administrative Judge of the Criminal Court of the City of New York and is responsible for supervising and administering the operation of that Court on a city-wide basis. Defendant Eugene Gold is the District Attorney for Kings County. He and his staff are responsible for the representation of the State of New York in all criminal matters arising in New York Supreme Court, Kings County. These defendants are duly elected to their respective positions and their rights, powers and duties encompass the prosecution and processing of criminal defendants

through the judicial system in Kings County. Defendant Joseph Mangano is the Clerk of the Kings County Supreme Court. On information and belief, Mangano is responsible for maintaining all files, records and administrative data in Supreme Court, Kings County. Defendant Joseph Parisi is the Chief of the Criminal Term of Supreme Court, Kings County. On information and belief, Parisi's duties include processing, evaluating and answering pro se petitions submitted by criminal defendants and the administration and supervision of the clerical staff and supportive staff of the Supreme Court. Defendant Malcolm is the Commissioner of Correction for New York City. He is responsible for supervising the operation of the Brooklyn House of Detention and all other institutions under the care, custody and control of the New York City Department of Correction. Defendant Charles Fastov is head of the Probation Department in Kings County. His duties include the preparation and submission to the Court of presentencing reports.

The defendants are sued individually and in their official capacities as those responsible for the procedural workings of the Criminal Justice System in Kings County. At all times herein, defendants have acted and will continue to act under color of state law, custom and/or practice.

4A) Defendant Supreme Court Justices and Criminal Court Judges are so numerous that joinder of all who are sitting or who may hereafter sit is impracticable. The questions of law and fact are common to all Supreme Court Justices and Criminal Court Judges. Their defenses therefore are typical of the defenses of the class. Those Supreme Court Justices andCriminal Court judges presently parties will fairly and adequately protect the interests of the class thereby making appropriate final injunctive relief or corresponding delaratory relief with respect to the class as a whole.

7. On information and belief, attorneys from the Legal Aid Society are assigned as counsel in over ninety (90%) per cent of all cases therein in which a defendant is indigent. There is placed upon counsel assigned to represent plaintiffs a case-load of staggering proportions which precludes giving to plaintiff's cases the attention and work that is constitutionally required. By assigning an overwhelming number of cases to Legal Aid, defendant Criminal Court Judges and Supreme Court justices have made it impossible for individual Legal Aid attorneys to adequately investigate, prepare and try plaintiffs' cases and to otherwise adequately represent plaintiffs.

15. Defendant Gold and defendant Criminal Court Judges and Supreme Court justices, respectively, recommend against and deny plaintiffs release on their won recognizance where no imposition of monetary conditions could reasonably be thought necessary to assure plaintiffs' respective reappearances in court. The same defendants recommend the denial of and deny bail, respectively, in circumstances where the denial of bail is unnecessary to assure plaintiffs' reappearance. Defendants urge and set bail, respectively, without regard to plaintiffs respective financial situations.

The following are representative of the class of plaintiffs generally: in the cases of Donald Wallace, Maurice Hundley, Randolph Jenkins, Donald McCoy, James Brown, Daivd Minnis and Oliver Stewart, on arraignment after indictment, bail was set at amounts which indigents could not conceivably post. In the cases of Maurice Hundley and James Brown, after indictment bail was raised to $7,500 from the amount set in the lower court even

though plaintiffs remained incarcerated because they could not make even that lower bail. Algie McGill and Wilbert Donald, held by the lower court on $10,000 and $5,000 bail, respectively, are now held without bail. Bail review motions were filed by Jenkins, Brown, McDonald, Stewart, Minnis, Donald and McGill and were denied except that bail on one of Jenkins' indictments was reduced from $15,000 to $5,000. He is still incarcerated on a total of $17,000 bail.

18. By order of defendant Criminal Court Judges and Supreme Court justices, plaintiffs are and will be compelled to suffer incarceration of from six months to two years or more without having been convicted of any crime or having any civil judgement entered against them. This incarceration takes and will take place in overcrowdedjails where plaintiff's liberty is and will be severely limited by the prison conditions and regimen ordered and administered by defendants. This lengthy incarceration causes and will cause plaintiffs to lose their employment, with the result that plaintiffs and their families suffer and will suffer severe economic and financial hardship and mental anguish during plaintiffs' incarceration and thereafter. Frequently plaintiffs' lengthy incarceration also results and will result in the breakup of plaintiffs' families and the inability of plaintiffs' children to achieve normal educational, cultural and social growth.

35. Non-indigent felony defendants in New York, Kings County, from the time of Criminal Court arraignment, who are otherwise in the same position as plaintiffs, vis-a-vis the criteria for setting bail, are and will be able to purchase their pre-trial freedom, whereas plaintiffs, faced with the same or comparable bail, are and will be unable to do so, and are and will be forced to remain in jail before trial, all in violation

of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

Sworn to before me this
day of May, 1973

Yours, etc.

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ATTORNEYS FOR PLAINTIFF

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Attn: Hillel Hoffman

CORPORATION COUNSEL
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New York, New York
Attn: Victor Muskin

been here so long.

Q How do you feel about depression?

MR. HOFFMAN: I object.

THE COURT: Sustained. I have enough.

Is Judge Booth here?

MR. ALTERMAN: Yes.

THE COURT: Suppose I call him.

Mr. Hoffman,do you and your colleagues object to postponing other testimony?

MR. HOFFMAN: No.

W I L L I A M H . B O O T H , Judge of the Criminal Court of the City of New York, called as a witness, having first been duly sworn bythe Clerk of the Court, was examined and testified as follows:

THE COURT: I have occasion to testify in the State Supreme Court a while back. I think it's probably good for all Judges to have a turn as witnesses once in a while.

THE WITNESS: I was in this Court last year before another Judge, Judge Neaher, three days, and I didn't like the idea.

THE COURT: All right, Mr. Latimer.

(Continued next page.)

DIRECT EXAMINATION

BY MR. LATIMER:

Q Your Honor, how long have you been a Judge in Criminal Court?

A Five and a half years.

Q Where were you presently sitting?

A 120 Schermerhorn, this week AP3. I have been assigned to Schermerhorn Street for about four years except for times I worked in Night Court or when I have had to work occasionally in somebody else's place.

Q And before you were assigned to the Brooklyn Criminal Court, where had you sat?

A I was in Part I-C out in Queens, Kew Gardens. That was a part that was established, the first all-purpose part in the City of New York and the Criminal Court.

Q And can you describe the concept of all-purpose parts?

A Yes. The concept is one which is not new, but it is new to New York City. It's not new to other places. The idea has merit in that if a defendant is brought from an arraignment to an all-purpose part, the same Judge stays with that case all the way through from beginning to end whereas before we had specializations.

We used to have parts for narcotics, parts for

motions, parts for sentencing, parts for all kindg of things, and you may have ten to twenty Judges who would hear one case whereas with all-purpose concept, it goes to the all-purpose part and stays there after the arraignment from beginning to end.

One Judge is familiar with it. Usually the same prosecutor stays with it and also, if the Legal Aid Society represents a defendant, the same lawyer stays with it all the way through as well, so there is familiarity, and it has resulted in a great saving of time, and we believe better justice.

Q And does the entire Brooklyn Criminal Court function on the all-purpose system?

A Well, I was talking about Queens. Part I-C was an all-purpose part that I started with Judge Dudley's direction, Edward Dudley, our administrative justice at that time. For one year I conducted that part, and it worked so well thatnow all the parts in Queens are all-purpose parts. I was sent to Brooklyn with the express idea of setting up the all-purpose part in Brooklyn. I was sent to AP-1, all-purpose part I, and quickly we found that things were not the same in Brooklyn, that some of the lawyers objected to their not being able to shop around for Judges, some of the Judges didn't like the idea of the all-purpose concept either. They

weren't familiar with it, and the all-purpose concept although we have four all-purpose parts in Brooklyn, is not working quite the same as it was in Queens.

(Continued next page.)

Q And can you tell us, if a case is assigned to your part, AP 1 or AP 3, now, I suppose, will that case in all events, stay in that part?

A No, it won't. That's one of the reasons it's not working.

Q Why wouldn't it stay in the part?

A The administrative Judge for Brooklyn, Judge Grower, will send around a clerk each morning to find out how many cases each AP part has, and he'll block off the cases, so as to even them out. If I have, for example, AP 1 fifty cases, and if AP 2 has 30, he'll take them off my calendar, and send them to AP 2, so as to even it out to 40 each. This wipes out the purpose of the all-purpose concept.

Q And this would be so even if the case had been heard in your part before?

A That's correct.

MR. HOFFMAN: Your Honor, I am not sure I understand what the relevancy of this line of testimony is, as far as the courses of action.

THE COURT: Mr. Latimer, aren't you right in the area the Court of Appeals said I couldn't do anything about, the manner of administering the State Courts?

MR. LATIMER: Your Honor, this goes to an issue of fragmented representation. My next question I was going to ask Judge Booth --

Q If the Legal Aid Lawyers stay with the case, or if they go --

THE COURT: All right, I will hear that.

Q -- or if they stay in the Part when the case is transferred out of your Part?

A The Legal Aid lawyers who are assigned, used to stay in the part in which they were assigned until recently. As of the advent of what they call the vertical representation.

Now, they send the lawyers to whichever part the case goes to. This is something that's just started in the past month or two.

Q Now, in your -- can you tell us how long your assignment to Brooklyn was initially for this purpose?

A Three months. I have been here almost four years.

Q Why?

A I believe -- I don't know why. I have been assigned, and I can't question the assignment, but I believe it's because the all-purpose part is not working.

MR. HOFFMAN: Your Honor, I object to this.

THE COURT: Well, I will sustain that. And I suppose if you did question your assignment, you could talk with the administrative Judge or Chief Judge.

THE WITNESS: I could talk with him.

THE COURT: All right, go ahead, Mr. Latimer.

Q On to something different. When was the last time

that you sat in arraignments part in Brooklyn Federal Court?

A I don't know. I have not sat in the daytime arraignment part except on weekends. I have sat in arraignment parts at night, and I believe it was three weeks ago that I sat in the Night Court for one, for seven nights in Brooklyn.

Q And can you tell us approximately how long an arraignment takes in Brooklyn Federal Court?

A An arraignment generally takes a couple of minutes.

Q And what is done in an arraignment?

A At an arraignment, the charges are either read to the defendant, or else the defense counsel waives their reading and bail is set at a Part, and an adjourned date for hearing is set.

Q And on the setting of bail, does the District Attorney make a recommendation to you?

A That depends upon the District Attorney. Most of the Assistants make recommendations. Some of them believe that it is not their function. Most of them do make recommendations.

Q And will they speak on the question of bail even if they do make recommendations?

A Oh, yes, they always speak on the question of bail, and they usually make a recommendation as well.

Q And when they speak on the question, what do they

generally say? What kind of information do they bring before the Court?

A They usually look at the charges. They stress the severity of the charge. They stress the probability of conviction, and they stress the NYSIIS report, record of the defendant, as well.

Q Can you tell us what information, what written information or document that you have in front of you at that arraignment?

A Yes, I have before me the charge, usually the signed affidavit by the complainant, and I have the NYSIIS report, which is the fingerprint record, and the report made by the Pre-trial Services Agency.

It used to be made up by the Probation Department; now made up by Pre-Trial Services, a private institution.

Q What is the function of Pre-Trial agency reports?

A Their function is to recommend to the Court either parole or not parole; parole meaning the new ROR Relief on recognizance.

Q And at the arraignment itself, is the Pre-Trial Services Agency Report, do they have any indication that the information on those reports is verified or not verified?

A Yes, they have a column alongside in which they either verify or not verify all the various items which must be

twenty items that they make a list of. All those items individually are verified or not verified.

Q And can you estimate approximately what percentage of cases at arraignment they have verified information?

A Most of them are not verified. I couldn't give you a figure, but most of them are not.

Q And what function, if any, does the ROR sheet, the Pre-Trial Services Report, have in your particular bail determination?

A It has a great deal of weight with me. If I have a verified sheet, I can trust the reliability of the information. I trust the credibility of the Agency, because I know the people who run the Agency. I know what they do, and how they do it, and it has a great deal of weight with my consideration.

Q What sort of information is on the ROR sheet?

A The residence of the defendant, how long he has lived here or there, or whatever it is, who he lived with, what his work record is.

Sometimes information at the very bottom as to warrants that may have been issued or other pertinent information. There is quite a lot. His age, date of birth. Quite a lot of information is given.

Q In other words, it goes to his roots in the community?

A Precisely, one whole sheet.

Q And the arrest record, or yellow sheet as they are usually called?

A They used to be -- they were yellow in color once. Now, they are white, so we call them the NYSIIS report.

Q Okay, the NYSIIS report, does that have up-to-date information on it as to the disposition of any prior arrests?

A Most of them do not. The dispositions are woefully lacking. That's one of the things I have complained about considerably.

THE COURT: The FBI reports are no better.

THE WITNESS: I didn't know. I think that's the fault of administration.

Q In your bail determination, what weight, if any, do you give to a NYSIIS report with prior arrests that have no disposition?

A I give no weight to it at all. There are judges who give weight to the prior arrests, and I think I have said to them, "It's wrong."

MR. HOFFMAN: Your Honor, I object to this. It's hearsay.

THE COURT: Well, it somewhat confirms my own

experience. I'll allow it.

THE WITNESS: I might say, Judge, this is not hearsay. This is statements to me by other Judges that they do regard the arrests, regardless of whether there is an arrest or not.

THE COURT: A number may have. But let's go on to another fact.

Q Now, does anybody at the arraignment -- is it possible at the arraignment to have updated information about the dispositions of arrests in the NYSIIS?

A Yes, the police officer, many times will make a check and will give me information which shows disposition. The defense counsel sometime does likewise, making a check of the records in the Court, if it's at night, and they usually can't find, because the records are closed.

Also, Pre-Trial Service Agency has computer put names of defendants through computers, and all other information and find out sometimes disposition in that fashion, but other than that, we have no regular method of getting dispositions.

Q Now, you have told us what the District Attorney says about bail at the arraignment. What kind of presentations do the Legal Aid arraignment lawyers make to you?

A They, of course, stress the fact that there is no disposition. They stress the fact that the defendant has worked

in the community in various fashions. They usually do not give me anything additionally to what I have got. I have got to ask them, give me something else other than what I have got in these papers.

Sometimes Community Defender Office, which is a part of the Legal Aid Society, within the community involved, they do have more dispositions showing. They do have more information about the defendant.

I suppose because they are in the community, and they are able to get this information.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. LATIMER: (Cont.)

Q Do they usually come to you at an arraignment?

A Once in a while, not often.

Q Now, again at the arraignment, which factors do you weigh most heavily in making a bail determination?

A The information on the pre-trial services report what they used to call the ROR report and convictions and the nature of the crime charged. If the complainant is there, I ask the complainant through the District Attorney. I ask information about the nature of the charges to determine the probability of success for either defendant or the People.

Q And does it influence your determination if members of the accused's family are present in Court?

A Very much so. As a matter of fact with youth, and I have youths from 16 to 19, with youths I will not parole a person unless a parent is there, no matter what the sheet says, because I believe that the parents should know that his son or daughter has been arrested, so the presence or absence of family makes a great deal of difference to me.

Q Now, do you state on the record the reasons for the particular bail determination that you have made?

A I certainly do.

Q And?

A I make sure that the reporter gets it. That's something else. Sometimes you say things too fast and it's not really the reporter. I think it's most important to make a note in the record as to the reason for whatever I do.

Q Are there any directives from the administrative judge concerning statements?

A Yes. Judge Ross, who was our administrative judge until recently, sent us a memo some time ago directing us to put on the papers in writing the reasons for bail considerations, bail determinations and most of the judges do not put that information in writing. I don't.

MR. HOFFMAN: Your Honor, I object to this.

THE COURT: Overruled.

A I don't put it in writing, but I do put it in the record, and I think that suffices.

Q Now, at the moment, I would like to ask you in terms of your practice in the Criminal Court how you define the term a reasonable bail?

MR. HOFFMAN: I don't understand what the relevancy is.

THE COURT: I am not sure where we are going on this whole bail question, but I'll hear it.

A Bail and the definition of reasonable bail

which is what we are concerned about a criminal for is a complex thing I would have to consider the roots of the defendant, whether or not he's got a job, how long he's been in the City, whether he is married or single, whether he's got children, what the severity of the crime charged, what the probability of success for the prosecution, what the record of defendant has been in the past. If there is a pattern of arrests or convictions for the defendant, whether or not the complainant has shown himself to be a reliable complainant, and this happens many times. There are so many factors that have to be considered that I wouldn't be able to just name them automatically I think.

Q Do you consider the information before you at the arraignment adequate to determine what is the reasonable bail?

A I use it, but I like to have more.

Q Has any attorney in the all-purpose part when a case has gotten to the all-purpose part, has any attorney ever asked you for an evidentiary hearing to the issue of bail?

A No, this has never been asked of me by any attorney.

Q Would you [illegible] favor such a request?

MR. HOFFMAN: I object to that on the grounds

of irrelevancy.

THE COURT: Not only favor it but would he grant it if made.

Q Would you grant such a request?

A I certainly would. I think that would be a better method of determining what bail is, what bail should be.

Q Can you explain to the Court why?

A Well, if you have somebody on oath giving testimony as to the roots of the defendant, as to all the factors that I have mentioned and many more, I think the Judge is in a much better position to determine what's reasonable bail for him, whether ornot the whole question is whether he is going to return or not to the process and having this determination merely upon statements made on papers is insufficient in my view, and I would prefer to have it from the mouth of the witness under oath.

Q Now, again going back up to the all-purpose parts, how often or how long a time is the average case is there between an arraignment and a preliminary hearing in the all-purpose part?

A Usually it's three days because of the new legislative rule that requires a hearing within 72 hours after the arraignment, so usually three days. Many times it's

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more than three days because of other considerations.

Q Does the hearing in most cases go on the first time on, or are they adjourned?

A Most times it's adjourned for -- I think I read reports from the Criminal Court Administrative Justice that came out. They indicate that in Brooklyn it's 3.2 adjournments for each case.

Q And in terms of a --

A And this is an improvement by the way over last year and over 1971 and '72.

Q And what's the average length of time of those adjournments?

A Usually three, four days each.

Q So that it would be a week or two weeks after the arraignment before the case goes?

A Between two and three weeks.

Q And at the arraignment, do you listen to bail applications?

A Yes I certainly do. To complete that answer, Mr. Latimer, I believe, and I follow carefully the idea that bail should be considered at every stage of the proceedings. Every time anybody comes before me, there is a bail review by myself whether it's asked for or not.

Q And do you know whether that's the practice of

other Judges?

MR. HOFFMAN: Objection.

A I don't know.

THE COURT: Overruled.

Q Now, what source, in your experience is there much new information brought out at the bail application at the preliminary hearing?

A Yes, always.

Q And what source of information is brought out at that stage?

A Many times defense counsel or the prosecutor has been able to determine dispositions of cases. Many times the defense counsel is able to determine information that shows roots in the community, to show, for example, that a man has been working for a period of time, to bring in the employer or many other pieces of information are brought together at the hearing that could not have been, that has not been presented at the arraignment.

Q I see, and do you regard this information as valuable in your determination?

A Certainly. I have many times at the hearing stage paroled a person or set cash bail or reduced bail where I could not have done so at the arraignment, because I didn't have all the information available.

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Q You mentioned that you set cash bail. Could you tell us the different categories of bail that are allowed by New York statutes?

A The New York Statute just recently amended two years ago provided now for seven or eight different types of bail. One type of bail is the secured bond. That's produced by the bondsman and for which a fee is paid and also collateral is put up by the defendant.

The second is cash alternative to that bond, and that is in some cases ten percent, but in this case there is no specification. It's just an arbitrary figure.

Thirdly, we have an unsecured bond in which the defendant himself signs his name and/or there is another kind in which he can sign his name and say, I will be responsible for a certain amount of dollars in the event I don't show up. There are partially secured bonds. There is a whole raft of kinds of bail that are available in the law. The troubleis that I have used only two kinds. One is either the bond or cash bail.

Q Can you explain to the Court why it is that you have used only those two kinds?

A Yes, because there are no forms for the other kind of bail. These are the kinds that are provided in law are not provided for by the administration of the Courts in

the City. As a matter of fact, there is the stamp that was prepared and given out to all Judges with notations given to us saying why. It says Insurance Company Bond, blank, for amount of dollars or cash, blank, for number of dollars. Meaning that you have at least two choices. Actually you' have seven. The memorandum that went along with that stamp said, "If you don't give two choices of bail, then the defendant has the right to sign his name." So as to avoid that, they have a stamp, every Judge has, which provides two forms. You must provide two forms according to the new law so that the two forms that are suggested by the administration are Insurance Company Bonds or cash bail, and that's a stamp.

Q Have any of those attorneys asked you for any of the other alternatives?

A Once in a great while. Very seldom do they ask for it, because I believe they know that there is a provision made forthem, provision in law, but not in the administration.

Q Under what circumstances do you provide cash alternatives?

A I provide cash alternative wherever I find there is no conviction showing. If, for example, I believe $5,000 is the proper bail for a person, I'll give $500 cash

alternative, but if this is a conviction, I don't give cash alternative.

Q I see, and at the preliminary hearing, did you receive additional information from pre-trial services agency?

A Yes, always. The pre-trial services agency is extremely good in this respect. They give us an up-date of information. They give us further verification. They give us dispositions. They give us a great deal more information at the time that the case comes to the preliminary hearing than they could have given. No, I shouldn't say could have. -- That they did give at the arraignment.

Q And do you know why they are able to give you more information at that stage of the arraignment?

MR. HOFFMAN: Oh --

THE COURT: Sustained. I think it's pretty obvious

MR. LATIMER: I'll withdraw that.

(Continued next page.)

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Q Are you familiar with Legal Aid Community Defenders' Office?

A Very much so.

Q And can you tell us what type of information they provide you with?

A The Community Defenders' office is unique. I don't think there are more than two or three of them in the entire City. It's an experiment right now, but it's an experiment working well in Brooklyn. They have an office in Bedford-Stuyvesant staffed by several lawyers and clerical people. They are able to get out into the community immediately and get information to me at the preliminary hearing and sometimes at the arraignment and always at sentencing. They give me a pre-sentence report in writing which I always appreciate, because rather than to have to rely upon the probation report, you have somebody else who has input as to the defendant and makes recommendations as to possible sentencing. That's something I don't get from anybody else, private lawyers or anybody else at all.

Q And the bail information that they are able to provide you with at the preliminary hearing, do you get that from any other sources?

A Seldom. Once in a great while I get it from a Legal Aid attorney other than the Community Defenders' office.

Q And?

A Excuse me, I get written information from the Community Defenders' office at the hearing stage which I do not get from anybody else.

Q And is this helpful to you in bail determination?

A It certainly is.

Q Now, you testified that every time the case is called, you make a bail review?

A Yes.

Q Do you do that whether the case is adjourned or whether it's a preliminary hearing?

A I do this in every case whenever a person comes before me. I believe I have a duty to examine bail.

Q And again, if you know the practices of the other judges in the Criminal Court --

MR. HOFFMAN: Your Honor, I object to this on the grounds of materiality.

A I don't know.

THE COURT: Well, I think the witness --

Q Now, could you, based on your information and on your experience in the Criminal Court, tell us the reappearance rate of poor people as opposed, who represented by Legal Aid or 18B as opposed to people able to obtain private counsel?

A Yes, I think I can. I think that from just an

overall view without giving statistics, people tend to return just as well whether they are poor or rich. As a matter of fact, I know some case where people who are rich did not appear. Mr. Beryl (phonetic), for example.

THE COURT: Well, that's the special case.

A A man up in Massapequa put up a half million and went to Mexico. A person on welfare can't get out and shows up. That's been borne out by experience.

Q And in terms of people released on their own recognizance, what is your experience with their reappearance rate?

A They generally show up. As a matter of fact, in AP1, I find that because I have a policy whenever people come in late of putting them in the pen and letting them sit there all day and get excuses from them later, they don't even show up late. They show up on time. We have one warrant issued a day, maybe other parts have ten, twenty warrants issued a day.

Q Are you familiar, are you familiar with any directive pertaining to automatic bail reviews of people in the Criminal Courts?

A Yes, either Judge Roth or the present administrative judge, Judge Sanderfor (phonetic) has set up a directive to have all criminal parts directing the administrative judge in each borough to review bail.

Q And are you familiar with the bail reviews that are conducted in the Brooklyn Court?

A Yes, I have the papers sent to me after Judge Glower, our administrative judge, has reviewed bail, and if there is an endorsement by myself adjourning a case from one date to another, in between that time, there is another endorsement by Judge Glower, and I talk to him about it. He has a batch of cases that come before him regularly once a week, I believe it is, and he looks through them to see if there is any reason for changing bail.

Q So, do you know approximately how many cases he reviews at this?

A I don't know the exact number, but it's a huge amount, maybe a hundred a week or more.

Q And does he ever call the attorneys in for these conferences, if you know?

THE COURT: If you know.

MR. HOFFMAN: Well, --

A I have talked with Judge Glower, and he goes through them without the presence of counsel.

Q So that his review is just on the papers?

A Precisely, on the papers alone. He will make notations, and I have seen the notations on the papers that come before me. Defendant has a Supreme Court hold. Defendant

has a Grand Jury hold or some other information which would indicate that there is really no reason for changing the bail.

Q Does he often change the bail on these determinations?

A I have not seen any that he changed. He may have. Once that comes before me, I have not seen any change.

Q Now, Judge Booth, are you familiar with a case that was pending in the Appealate Division, First Department, Bellamy against the judges?

A Which I was named as a defendant, yes, I am.

Q And have you read the Legal Aid memorandum in support of this?

A Yes, I have.

MR. HOFFMAN: Your Honor, I don't know what the relevancy --

THE COURT: Well, let's wait for the next question.

Q Based on your experience in the Criminal Courts in Brooklyn, do you consider that the conclusions reached by the Bellamy study are valid for --

MR. HOFFMAN: I object.

THE COURT: I'll sustain the objection to that. I don't know what the report is.

MR. LATIMER: Your Honor, I believe that the report in the Bellamy case had been introduced at a

prior hearing in this case.

THE COURT: I have a lot of papers, I know. It may include this, but you better ask him about a particular conclusion and what he knows with respect to it.

MR. LATIMER: OK.

BY MR. LATIMER:

Q The Bellamy report, among other things, concludes that defendants who are released at arraignment or early in the criminal process, are likely to stay out of jail pending disposition of their case. Do you agree with that conclusion?

A Yes, certainly.

Q Your observation?

A People who come in from the street generally stay in the street.

Q And what about somebody who comes in the Courtroom from the jail?

A Generally stays in jail.

Q And do you treat people who come in from jail the same, or do you regard them the same when they come in from the jail or the street?

A There is a tendency on my part to have to fight to treat each the same. You have to recognize the fact that a man in jail has just as much reason to be given consideration

as a man who is not in jail, and you have to keep that in mind all the time, and I do. I have been in jail four times myself.

Q It takes a conscious effort on your part?

A It certainly does.

THE WITNESS: In jail for civil rights activities, Judge, in Jamaica, in Rochdale Village incidents, and when I was the head of N.A.C.C.P. out there, Georgia, Mississippi and South Africa.

THE COURT: How much more have you?

MR. LATIMER: Just a couple more questions.

(continued on next page)

Q Did Bellamy's study also conclude that persons who are out on the street during the pendency of their cases will more than likely receive a sentence of probation or other sentences that do not require imprisonment or will receive less harsh sentences than somebody who has been in jail for a period of time awaiting trial? Based on your experience in Brooklyn, can you comment on that conclusion?

MR. HOFFMAN: Your Honor, I object to that unless the witness --

THE COURT: I am not sure how much it proves, but I'll accept the answer.

A I would give the same answer to your other question. I think that's true, that that is the trend.

Q And in your own practice as you have, have you been able to, have you found that true in your own sentencing in your own dispositions?

A Yes, there are cases in which I have put a man in jail when he comes before me on parole or bail, but generally when a man is out on parole or bail, he doesn't go to jail and, not only myself, everybody in the system tries to find a way to keep him out.

Q What about the man that comes before you who is in jail?

A There is less assistance from anybody to let him

out in the street.

Q O.K. Now, are you familiar with the Supervised Relief Program of Pre-trial Services?

A Yes, I certainly am.

Q Do you find that to be a valuable tool in your handling the case?

A Yes, I certainly do, just as all other programmatic diversive acts and programs.

Q Can you tell us why?

A Because if you have somebody who is responsible for a person in the street, and if you have someplace for him to go, something for him to do, he is likely to return, and there is rehabilitation started already, if rehabilitation is the goal. Certainly that is the beginning of rehabilitation when you can put somebody in touch with somebody else who is going to be able to help him, and I think that's much more important, the diversionary practice of the Legal Aid Society, of the Pre-trial Service Agency, of the various drug programs. There is a Mr. Bernard Ragonvania (phonetic), clerk in AP-2, Brooklyn. He deserves a great deal of credit. He and his wife work for nothing --

THE COURT: You are getting a little beyond.

A Very fine program.

THE WITNESS: Sorry.

MR. LATIMER: Judge, I have no further questions.

THE COURT: All right, do you want to cross? I would like to excuse Judge Booth before we adjourn for lunch, possibly.

THE WITNESS: We had a bomb scare at Criminal Court. That's how I was able to get out.

THE COURT: We have them here also.

CROSS-EXAMINATION

BY MR. HOFFMAN:

Q There is a substantial reduction of backlog in Criminal Court in the past two years?

A There certainly has been.

Q Will you tell the Court the order of magnitude?

A I believe we were at a backlog of 13,000 about four years ago, down to about five now. I think that's pretty nearly accurate. That's reflected throughout the city.

Q How can bail be reviewed in Criminal Court before it gets transferred to Supreme Court?

A Each time it comes before a Criminal Court trial before myself it's always reviewed. That might mean, three, four times.

Q So that a defendant while his case is pending in Criminal Court has opportunity for constant bail review:

is that correct?

A Every time his case is brought to the Court, in addition to that, once a week or with some regularity Judge Grower makes that mass review I mentioned before.

Q Now, when an attorney appears bef[illegible]ou at arraignment, and question of bail arises, do you question the defendant?

A I don't question the defendant, no. I insist that the defendant speak not at all, and I remind him that anything he says can be held against him. I don't want him to talk, but I do ask through his attorney for information about the defendant or from the defendant, and he speaks through his attorney.

Q If the defendant wishes to address you about his family situation or his employment situation not with reference to the crime, would you permit the defendant to address you?

A I certainly would, if his lawyer agreed.

Q And on occasion, have you permitted defendants to tell you something about their family background?

A Yes, I have.

Q Now, if a defendant brings his employer to Court or his parents to Court, do you believe it's necessary in that situation to conduct an evidentiary hearing?

A I think an evidentiary hearing is essential at all times merely because of the oath, and you know. I have found, for example, a prostitute will bring in somebody she says is her husband when, not in fact, is he her husband at all.

Q Do you make it a regular practice to swear in family members or employers when they appear before you at arraignments?

A No, I have never done that. Maybe that's what I should do.

Q Now, sitting as an arraignment judge, approximately what percentage of the defendants that appear before you are released either on bail or parole, and what percentage of the defendants are remanded to jail?

A I would say probably very few are paroled, very few put bail and whether they make bail is another question. I don't really know. Immediately, not many make bail, but then either the same night or next morning, bail is made, and I believe maybe half of them are paroled or bailed. Maybe half, that's just a wild figure.

Q And at the time that the defendants appear before you at the preliminary hearing which may be three days or nine days or 12 days after the arraignment, at that point what percentage of defendants have been released on some form of

recognizance or bail, and what percentage of defendants are still in jail?

A That's what I would say about half.

I would see if the first time after arraignment. The first time after arraignment, I find about half who are out and maybe after that first time there may be a few more because of additional information which we get. It may run up to two-thirds out.

Q Now, when a defendant is brought to you, before you at arraignment and the man has been in jail, what are the reasons that the defendant has been in jail prior to the arraignment?

A Primarily because he can't make the bail even if it's $50. In many cases they can't make $50.

I had it today. A man was there; could not make $50 bail. I parole them today generally because they don't have the money or sometimes they have the fee for the bondsman but don't have the security. That's mostly what it is.

Q Well, speaking about cases where a defendant is brought before you for the first time at the arraignment, are there other legal reasons why defendant may be in jail other than having nothing to do with his financial ability?

A There are sometimes holds on him from other courts, and there are sometimes a parole violation, as a result of the arrest.

Yes, there are other reasons.

Q Judge Booth, if a man is, has a parole violation warrant lodged against him, would you be as likely to bail that defendant as someone who did not?

A I will set bail in accordance with the charge I have before me, and the parole violation board holds him until he gets a chance to have a hearing on that. I don't recall the parole violation, if it arises as a result of this arrest, I don't use that to determine what the bail should be in the present case, because I don't think I should.

Q Would you be influenced by the fact that the man has a prior felony conviction?

A Absolutely, always.

Q And if a man is under indictment in another county and brought before you in arraignment, would you be influenced by that factor?

A To a lesser extent because it's only an indictment. An indictment doesn't mean conviction. I have to always remember that.

Q What are the reasons why defendants request adjournments at the preliminary hearings?

A Defendants who are represented by private counsel request adjournments because of non-payment of the fee, sometimes; who are represented by the Legal Aid Society

because of continuing investigations. They are not quite ready to prepare for the hearing. Most times it's for that reason, or thirdly, I just remembered something, because of the possibility of some kind of diversionary program that is being worked out for the defendant.

(Continued on next page.)

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Q Would you say in those cases that the adjournment of the preliminary hearing might be to the benefit of the defendant?

A Sometimes. Most times not, where there is a question of the fee of an attorney. It's not to his benefit.

Q But if the case is subject to further investigation, would you say?

A Yes, yes. I had one today in which they are investigating the possibility that the car in which a man was riding and was charged with grand larceny may have been properly in his custody. That's a subject of investigation. It was put over to 2:00 o'clock to get more information.

Q What weight do you give to the recommendation of the District Attorney on bail?

A I give the same weight that I would give to recommendation of any counsel.

Q So that the District Attorney's recommendation then carries no greater weight than the recommendation of the defendant's lawyer?

A Other judges have told me otherwise.

Q I am speaking about your practice.

A Myself, no. That's correct.

THE COURT: Any other questions of Judge Booth?

MR. WEBER: One or two questions.

A (continuing) That was the State and now it's the City.

CROSS EXAMINATION

BY MR. WEBER:

Q I am going to ask you a question on ROR practice. You stated there were about 24 items per sheet.

A Yes.

Q You mentioned you checked each one you went through?

A I certainly do. Every little one of them.

Q And do you check to see, let's say, if there is a phone number after an address or phone number of the employer?

A Yes, I do, and sometimes I will have the case called again so that a telephone call can be made to give the verification that we need.

Q You made a statement most were not verified. On those you find that were not verified, did you find they were not phone numbers to enable the ROR individual to call them?

A That's true.

Q So that would not necessarily be the problem. There is no number furnished by inmates or defendants to be able to verify it?

A Yes.

Q How long would you say it really takes you to go

through all this procedure checking ROR forms?

A A couple of minutes for the entire arraignment. It's a matter of a couple of minutes.

Q And how much time were you able to give to ROR report?

A Scanty.

MR. WEBER: I have no further questions.

THE COURT: Judge Booth, the big question, about the fact probation is more likely if a person is released in the beginning. To what extent does that depend on the fact that somebody placed in jail is more likely to be a person with a record, a person against whom there is serious proof and the ones in jail may include a greater proportion of guilty ones?

THE WITNESS: Except for the fact that the Bellamy report which I did read — I read thoroughly — shows that people with the very same background have had different results by reason of being paroled or bailed. I don't specifically have cases, but I do know that this has happened.

THE COURT: All right, anything more?

MR. LATIMER: Yes, your Honor.

(continued on next page)

REDIRECT EXAMINATION

BY MR. LATIMER:

Q You stated there has been a reduction in backlog over a couple of years?

A Yes.

Q In your opinion, should there be a backlog?

MR. HOFFMAN: I object.

THE COURT: Sustained. You might ask how many cases were disposed of over a year, so I could tell what five thousand means.

THE WITNESS: I don't know the amount, Judge. I know my part, AP1, where I sit usually has at least fifty cases on each day, and that's seven days a week.

THE COURT: Fifty cases a week?

THE WITNESS: No, two hundred and fifty cases a week, five days, if you multiply that by the five AP parts that we have got. You have got a large number of cases. Now a five thousand backlog, I think we handle -- this is just an estimate. I think we handle about thirty thousand cases a year.

THE COURT: You are much more up-to-date than the Supreme Court?

THE WITNESS: Yes, we are. Oh, yes. That's most important. Most of the newspapers don't mean that.

They speak of criminal term when they mean criminal term of Supreme Court and that slanders us. I mean,not the judges.

THE COURT: I won't tell that to Judge Brownstein.

THE WITNESS: I think he would agree they should make a distinction between criminal court and criminal term of Supreme Court of New York, and they don't make that distinction most times.

BY MR. LATIMER:

Q Judge Booth, you testified both on direct and cross there is constant bail reviews as cases go through the Court. Is there always new information at these bail reviews?

A Not always. I think though that the fact that a day or two is passed and a week passed is new information to me. I take that very heavily. I don't know how many other judges or if other judges do the same.

Q Have you ever had occasion where a case has not been reached on your calender, then adjourned for a day, two or three days hence, a lawyer has come in to you saying, I have some new bail information, and would like to do something for this person now.

A I would advance the case, tell him to go to the Clerk of the Court, ask that the papers be advanced so I take the bail application. I have done that. I do that every day.

Q This is, of course, if the attorney has new information to present to you?

A Yes.

Q Now, you also --

A And that's done without the presence of the defendant, because he can't usually be produced at quick notice.

Q But you will, if the facts merit it, you will make arrangements to have him released?

A We send in a superceding commitment. That commitment shows a new bail, and he may then be released.

Q You have also testified about defendants requesting adjournments before the preliminary hearing. How often are the adjournments requested by the District Attorney?

A Equally or maybe even more, because the absence usually of the complainant or the absence of the report from the ballistics department or from the chemical laboratory because of the absence of the officer in some cases.

Q Are you familiar with the term, final marking adjournment?

A Yes, I use final markings always, and I have a reputation, and I do respect those final markings. Many judges do not. They mark it final. I have seen papers marked final, People, adjourn again, then final, People again, adjourn again. When I was a lawyer for seventeen years I said I wouldn't do

that and --

MR. HOFFMAN: Your Honor, I object.

A -- (continuing) -- and I don't.

THE COURT: Do you have any more?

MR. LATIMER: Just one question.

Q Have there been occasions where you have remanded a defendant because he has incomplete information and where if you had had a more thorough report on his bail facts, you might have paroled him?

MR. HOFFMAN: Objection, your Honor. Speculative.

THE COURT: Speculative. I'll sustain it.

MR. LATIMER: I have nothing further.

THE COURT: Anything more? Thank you, Judge Booth.

We will adjourn until ten minutes after 2:00.

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AFTERNOON SESSION

THE COURT: Go ahead Mr. Alterman.

MR. ALTERMAN: Your Honor the plaintiff calls Judge Brownstein.

IRWIN BROWNSTEIN, Justice of the Supreme Court of the State of New York, Kings County, called as a witness, having first been duly sworn by the Clerk of the Ccurt, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALTERMAN:

Q Judge Brownstein, are you appearing here by subpoena?

A Yes.

Q And are you currently a judge in the Supreme Court?

A Yes sir.

Q For how long have you been such a judge?

A Five and a half years.

Q And prior to that time, were you a Civil Court judge?

A Yes.

Q And prior to that time, what did you do?

A I was a memeber of the State Legistature, seven years.

Q Before that?

A Assistant corporation counsel for five years. Before that I was a clerk to Chief Judge Conway, Court of Appeals.

Q So you are familiar with the Criminal Justice system as it exists in the county?

A Yes.

Q Okay. Do you do arraignments, Judge Brownstein?

A Yes, I have.

Q And over the course of you sitting as a justice of the Supreme Court, can you estimate how many arraignments you have done?

A Approximately, well over a thousand, perhaps 1500.

Q And how often do you sit in arraignments?

A Well, I sat in the arraignment part last December. I sat there again this June and before that I sat perhaps once or twice.

Q Now, when a defendant comes before you for arraignment on indictments in Supreme Court, what papers do you have in front of you to make a bail determination?

A Generally, and this is not always the case. Generally I have the lower court papers which consist of affidavit in Criminal Court, the yellow back which tells me

the process that has already taken place -- that is the lower court arraignment. The bail that was fixed in the lower court, whether or not a hearing was conducted, and that's attached to a Vera form and sometimes, well not sometimes, but whenever I have that, I have a NYSIIS report, Criminal Justice Service report known as the yellow sheet. I also have -- I am sorry, I also have the indictment in the Supreme Court.

Q Do you set bail on each person that you arraign?

A I either set bail or remand the defendant depending on what is charged.

Q When you arraign someone, what information do you fe l that you need in order to set or make an adequate determination as to bail?

A Well, the Criminal Procedure Law requires that I attend to certain elements and facts not exclusively, but at a minimum in the nature of the crime, probability of success of the District Attorney in his prosecution or probability of success of the defendant in his defense, the prior record of the defendant, his works in the community and principally the likelihood of his returning to Court consistent with either bail or parole.

Q Do you ever know from the Court papers the reasons why judges are setting bail in the lower court?

A I can only guess at it. I have never seen a paper endorsed as to why a certain bail was fixed.

THE COURT: I see we have our court reporters here. I am afraid Justice Brownstein with the Jury waiting -- recess.

(The proceedings were interrupted in order to read back to the Jury in another proceeding.)

THE COURT: All right Mr. Alterman, you may continue.

BY MR. ALTERMAN:

Q Judge Brownstein, you testified that when you gets arraignments in the Supreme Court, there is certain information that is available to you at that time, the ROR report, the Criminal Court complaint, the yellow sheet and other data. Is that information always available and always filled out completely?

A No, it isn't. It's a rare occasion when the yellow sheet, the NYSIIS report contains dispositions. I think it's terribly unfair to a court, to the District Attorney and to the defendant to have me attempt to fix bail because a man has been arrested a dozen times. It may very well be that what appears to be a dozen felony arrests were in fact either dismissed as the arraignment, disposed of as misdemeanors or offenses or violations. I have to rely

entirely upon the defendant's information which may or may not be accurate, because frequently defendants do not know a conditional discharge is not a dismissal. I don't know whether he has a prior felony conviction, and he may not know that, so it's infrequent, and I have recommended it on many occasions, a very simple way to cure that. After having spent millions of dollars for a computer which works very slowly, doesn't seem to contain the information that we want, when I sentence a defendant, I have a probation report, the second sheet of which contains a full record of the defendant. The probation department puts in thousands of hours just accumulating this information. It describes the date of arrest, the nature of the crime for which the defendant was arrested, the disposition of the case and sentence, so that if there were a plea to a lesser degree of the crime that would be there, and the sentence would be there. For example, when this information is made available to me, I might be aware for the first time as happened to me today that a defendant is being sought elsewhere. He may be in violation of probation, violation of parole. I haven't any idea from the present information that that's so. Now, if we took that second page of the report and Xeroxed it and sent it to Albany to the Criminal Justice Service and put that into the computer, the next time the

next time the man was arrested I would get a pretty fair picture of what his record was, fairly. I don't mean a fair picture, but a good picture, what it is in a fair way.

Q Would you then sentence a defendant is that information was missing?

A If it's a serious charge, if it's a Brooklyn case, I ask the District Attorney to check it. The District Attorney has been very patient with me, and other judges in that respect. Sometimes it takes more than two days. I am compelled to arraign a defendant in what is the best possible way nevertheless unjust.

Q Against who?

A Unjust against defendant. If I find on the yellow sheets that there is an arrest for murder or robbery or rape, there is a flag that goes up. It's suggestive. You can't avoid it, and your concern is what happened to that case. Is he a second felony offender? He may be a fourth felony offender? Is he wanted for a violation of parole? Now, there is a way that you can avoid making serious mistakes. I have employed this technique and other judges have. If a defendant is incarcerated when he comes to me for arraignment, there is a card that travels with him called, referred to by its color, the orange card. This is a Correction Department record and generally but not always there is a

list of any other holes, any of the cases, warrants, for example, parole, probation warrants which are listed in a little box on that card. It will also tell me what other court appearances he has made. Now, this is invaluable both at the arraignment and at the very disposing of the case. I don't think it's fair to a defendant who might have two, three cases in Criminal Court, one up in the Supreme Court to take a felony plea and let those three cases hang out. It's a terrible duplication of work for the District Attorney, for the defendant and for the Court, so at the time of disposition if I am aware of these cases before the plea is taken, the District Attorney frequently will consolidate or cover other cases.

I had a case today for sentence, the defendant came in. I got the probation report and for the first time learned there were three warrants for him in the Children's Court. He is sixteen years old. Now, it really is patently unfair for me to place a young man like this on probation, and then have the probation officer tell me incidentally you have you know two or three other matters which are pending in Queens and Brooklyn and have him then committed for some reason or another. It makes no sense to do that, so having this information on arraignment is absolutely essential.

Q How about having this information available at the arraignment in the Criminal Court, how essential is that?

Brownstein-direct

MR. HOFFMAN: Objection, your Honor.

THE COURT: I guess the judge said in Civil Court.

THE WITNESS: I said in Criminal also. Civil Court judges also set in Criminal frequently. At the time I was in Civil, I set in Criminal.

A I think it's no less essential. As a matter of fact it's probably if not more important or equally as important. It's more important for me to kn ow at the time that I arraign a defendant what the bail was in the lower court, because the District Attorney frequently and almost more than the majority of cases will ask that the same bail be continued.

(Continued on next page.)

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Q So if the guy is in he stays in?

A Well, whatever the consequences is, the most natural thing to do if you are trying to get through a calendar of fifty arraignments, is to say, okay. Someday I'll continue presuming that an effort was made in Criminal Court to make a just and fair fixation of bail.

Q How important do you think the initial setting of bail is in Criminal Court?

A Very important if our practice is to continue bail, if there was an error in the Criminal Court, that error is continued right throughout this time in Supreme Court.

Q You think it would be helpful for indigent defendants to have an evidiciary hearing in Criminal Court with respect to bail?

MR. HOFFMAN: Your Honor, I object to all these questions.

THE COURT: I am not sure how much this opinion really has to do with the Federal constitutional rights, but I'll receive it.

A Of course, it would be helpful. Whether it's realistic is another question. In Part 1 in King's County, I may have 120 cases on in a day. That is another way to handle it.

Q What is that?

Brownstein-direct

A Well, we now have the Vera reports. I don't know how much time this allowed inthe investigation of the information, but I have seen oh hundreds of occasions, hundreds of occasions, checkmarks on the form, unverified, employment, roots, let us say residence unverified, relationship, family unverified. This operates against the defendant, although I must say in all fairness, we have them qualified for ROR based upon unverified information. The red flag is when they make no recommendation. Then you know if there is no recommendation forROR, they want you to keep him in, but wouldn't if be better if they spent a little more time trying to verify.

Q Is the information generally verified when you get into Supreme Court?

A I would say perhaps better than half of the time it is, but almost the balance of that is not verified.

Q How much, how important can you consider the criteria set forth in Section 510 of the CPL which is the bail section?

MR. HOFFMAN: Your Honor, I object to that. The statute speaks for itself.

MR. LATIMER: I am asking Judge Brownstein.

THE COURT: No, the statute has a lot of different factors to consider. I'll bet Judge Brownstein

give his weighing of them.

Q What is the singlemost importnat factor in you setting or considering bail if there is one?

A The most single important factor is the return of the defendant, but in fairness, I am sure you recognize that fixing bail is a very subjective thing. The statute precludes our consideration of whether or not a defendant, if he is released will commit another crime. We are not allowed to consider is he a danger to the community and himself. Up till 1970 we could but we are not now.

Whether the statute bars it or not, there isn't a way in the world you are going to tell me a judge to erase from his consciousness or subconsciousness his fear that if I release the defendant he is going to go out and do it again.

Now, the Family Court Act allows for this and the New York State Criminal Procedure Law formerly allowed for it. Now, if it were amended and allowed for it practically speaking with the limitation of time, I think we would get a better setting of bail as to those defendants not dangerous to themselves.

Q Do you think if more information was available to Supreme Court and Criminal, that more defendants could be released?

MR. HOFFMAN: I object.

A Yes.

MR. HOFFMAN: I object. That's speculative.

THE COURT: I am not sure what I mean to do about it.

Q Why?

THE COURT: What I'm going to do after I get in all this testimony, Mr. Alterman, I suppose --

MR. HOFFMAN: Wait until Judge Brownstein has testified. I'll let him answer.

A I tried on two separate occasions and experimented with a -- Court's applying certain things first of which was to dispose of an enormous calendar.

Q What did you do, what did you do with the experiment when and under what circumstances?

A In December, 1972, and in June of 1972, I took my courtroom to the jail. Now, I did that. In June of 1972 --

Q Why did you?

A I was about to go on vacation, and I had a three-week, and Judge Damiani and I talked. We had either six or eight hundred conference cases backlogged. We had Part 1A and Part 1AA and I offered to set at Part 1AAA. The problem was that we didn't have space inthe courthouse, so

13 1 Brownstein-direct

I took the conference calendar of 1AAA over to Part 1A, arraignment jail courtroom. I did it for a host of reasons. Important first of all was that we couldn't house those defendants that I was going to see in the pen. There is no room for them. If you have two conference parts and arraignment parts, there is no space to put the defendants. Secondly, I would have less time, less of the hard time finding defendants. If I knew they were supposed to be in the Men's House of Detention, if they weren't produced for one reason or another, I could send the officer back up to look for them, and we did that at the end of each day. We had four or five people who were according to Correction, lost.

Q Does that happen very frequently in Supreme Court?

A It formerly did. We are having much less of that since we have the 299 cards.

Q Does the same thing hold true in the arraignment part?

A No, the arraignment part--

Q Why?

A I frequently had to issue warrants for -- when I knew they were in correctional institutions. Couldn't find them. The only way to find them was to drop a warrant on them.

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2 Q Is the warrant ever vacated?

3 A Certainly. It isn't a question of being vacated
4 when we know he is in jail. If a bail of $50,000 is fixed
5 on a man unemployed who has no work, we know he is in jail.
6 Correction doesn't know where he is, so after a third time
7 of not producing him, we issue a bench warrant. The warrant
8 is filed with the Correction, and they find him.

9 Q How many times does this happen? Is it a fre-
10 quent occurrence?

11 A Perhaps a half dozen times, three times a
12 week when I set there. Now I took the conference part to
13 the jail, and the result of what happened was I think as a
14 result of other things I did, for example, we had the New
15 York Lawyers Committee for Civil Rights under law available
16 to us. We were able to get them to come down to the jail.
17 I called Marty Mayor at the addiction services agency and
18 asked him to come down with a couple of people who could
19 interview defendants. We had, as the result of ASA coming
20 in, we had people from Phoenix House, Daytop, Odyssey and
21 other. I was able aside from disposing of the calendar which
22 really was my first motivation to try to get those cases con-
23 ferenced. I began to get the feeling that there was a lot of
24 people in jail on that calendar who whether they pleaded or
25 not really could have been placed under supervision and taken

off the jail pending trial or sentence, and on the conference calendar I thought it was a rather successful attempt. Later in the year, I had a trial calendar. Now, this I felt was going to be a little more difficult because I had 360 cases on my calendar in Part 7. About 250 of which were jail cases. Now, it's unrealistic to think that you know that those cases can ever be tried. If we were to try one a week, it would take seven years to try.

THE COURT: How could you have 300 cases a piece when there are twenty parts?

THE WITNESS: We have thirty parts now, but we had less parts then.

THE COURT: All right. I interrupted you.

A It's a classification of parts that causes the backlog. It's because it was a Legal Aid part with both jail and bail, and it was a traditionally heavy part. I took the 250 jail cases over to the jail during Christmas holiday, and in the eight days I saw everyone of the jail defendants and almost every bail.

Q How many people got out as a result of the conferences?

A Of the 250, there were dispositions in 60 cases, that is to say pleas of guilty. In addition interspersed with those who pleaded guilty and those who did not, those

who wanted trials, I was able to parole forty people.

Q Out of the forty?

A But I paroled each of them under supervision of either a drug agency or the New York Lawyers Committee.

Q Out of the forty people how many subsequently reappeared for trial, if you know?

A I think all of them exce pt the first one. The first man I paroled was being taken to a drug treatment program, stepped on the train, and when the door started closing, stepped back off the train. The counsellor for the drug program was on the train, and he was not. He was arrested the following day. I asked the Police Department could they help us find him, and I must say that he appeared, but not quite voluntarily.

Every other of the defendants, I had no problem with. Occasionally I am sure that there might have been one or two who split, people who didn't return, butuultimately they came back.

(Continued on next page.)

Q What role do you think an agency like Pre-Trial Services could play in both alleviating congestion in trial and also getting people out on the street a little earlier in the process?

MR. HOFFMAN: Your Honor, I object to that. That's a question directed to the performance of another agency.

THE COURT: Well, it's an agency that's supposed to be helping in the judicial process, and we should look at the whole thing.

I'll overrule the objection.

Q And when should they get into the process, Judge Brownstein?

A Well, examining what we have today, the Pre-Trial Services Agency was funded with I think $996,000; almost a million dollars. I don't know. I get the statistical report every week. I don't know how many people there are under supervision. I'd like to see them in other parts of the country involved with perhaps more serious crimes, and I understand the reluctance of PTSA to get involved in more serious crimes.

THE COURT: Are they only in the Criminal Court?

THE WITNESS: No, they are in Supreme Court,

but today I had the first murder case where I paroled a defendant to Pre-Trial Services. I got a favorable report from them. A man with no prior record, he was charged with murdering his wife. He worked all his life. He was a responsible person and is charged with an A felony, but he's been offered a plea to less than an A felony, manslaughter in the first degree, which would give me great discretion, if he took the plea, not to send him to jail, if I didn't want to at all or to send him to jail for much less time than 15 to life.

PTSA today I think took the first murder case.

Q O.K.

A I'd like to see them involved at the very moment of arrest.

Q Why so?

A Well, we don't afford a defendant except a limited number through pre-trial services an opportunity to demonstrate pre-adjudication before a finding of guilty either by conviction or after trial or by a plea. We don't afford defendants generally an opportunity to prove to the Court that in the time between arrest and sentence, they had made some progress under supervision.

I have had some marvelous results with people in those

two experiments who are in jail, who under supervision of New York Lawyers Committee or under supervision of Pre-Trial Services were able to get vocational training, drug treatment, marital counseling; whereas a great problem to many people who by the time they came back for sentencing, I delayed sentence. I didn't sentence them earlier. I wanted to see how they would do, were able to demonstrate to me that a jail sentence would be inappropriate, that a sentence of probation would be better for them.

Of course, my sentences of probation are conditioned upon a harsh result. If there is a violation, my agreement with the defendant is whatever the maximum sentence that I could have imposed, I will impose, and I have a lot of people on probation, and I don't think I have a great many violations.

THE COURT: Mr. Alterman, this is all very interesting to me, and I think may have some good ideas for the State Court, but please where are you driving to, as to my powers?

MR. ALTERMAN: I will restrict my examination.

Q Judge Brownstein, this goes right to the point. Have you observed as to the ultimate likelihood of convictions between those out on bail and those on pre-trial incarceration, all else being equal? Is there some

observation that you can make to that question?

A Well, statistically, I cannot assure you of the result, but my general feeling is that the man who is out on the street awaiting a trial will do far better in a trial than a man who is incarcerated.

Q Why, do you think?

A Well, his resources are much more limited if he is in jail. If he is out on bail and if he is working, he can afford to hire not only a lawyer of his own choosing, although many on bail have Legal Aid Society attorneys who are good. He can hire investigators, or he can himself seek out witnesses. He can come in to Court looking like a defendant who is not guilty by reason of the way he looks. Many defendants coming into court from jail don't have the clothing. They don't have the appearance that a defendant who presumes to be innocent should have.

I think it operates as a -- not as a prejudice, but as a hurdle for a defendant incarcerated.

Q Now, you testified that it's very important as to the initial setting of bail.

A Excuse me, can I go back just a minute?

Q Sure.

A I wanted to say statistically, it might show that the man who is in jail is convicted at a higher rate

than a man who is not, but there is another element that goes into that as well, to be absolutely fair.

If we consider the probability of success of the defendant or the District Attorney at the time we fix bail, then it shows that the probability of success that a man out on parole or bail is higher because a judge along the way somewhere must have said to him, "The D.A.'s case is not a very strong one." If I'm supposed to consider that, I'll either fix a low bail or parole, but all things being equal, I think a man incarcerated has a percent or two points less.

Q As a -- what is the initial setting of bail -- What exactly does the initial setting of bail have on you?

A In other words, when I testified the judges -- you don't see judges given reasons either on records or papers. Now, when you get a guy with $10,000 bail at arraignment, he must have been in for 45 days, so to speak.

Q How do you define reasonable bail?

A Well, a reasonable bail, the Court of Appeals and the Federal Courts have held, doesn't bear a great relationship as to whether or not the defendant can make it.

I really don't understand the concept. I know what it means if a defendant has a record and a defendant is probably going to be convicted.

If a defendant has roots to assure his return, we fix what we believe to be reasonable bail, but if the defendant hasn't any money whatever, then a dollar is not reasonable to him. It's reasonable to the statute, but not necessarily realistically reasonable.

Q You think all the information we are talking about plus the outside supervisory agencies were able to be there for more defendants then more people would get out on bail?

MR. HOFFMAN: I object to that. That's very speculative.

THE COURT: Overruled.

A If a man's family shows up, it has a great impact on the Court.

Q Like the church people?

A Absolutely,but most of my defendants stand alone. They stand with a Legal Aid lawyer who hopefully was the vertical system, and can say something about the defendant that's worthy of the defendant; but most of them stand alone, including 16-year old kids who on rare occasions have a parent interested enough or who know that he is going to be arraigned that day. It has a great impact on a judge.

Q Now, I think we have talked a little bit about bail.

A If a man has PTS a counselor from date of arrest, this man could assist me tremendously by telling me first whether he has a family, if they are in court, he can interview them, if he has the job waiting for him, if he has somewhere else to go except the House of Detention.

Q Now, who controls the calendar in Kings County?

A You mean trial calendar?

Q Yes.

A At the present time it's the District Attorney.

Q And how does that effect the congestion in the courts, if any?

A Well, I think it has contributed to it, but thatb -- that error is quite at an end. I think August 1st or within a short time after that. I am very happy to say that Judge Damiani's efforts to take the calendar over or coming through. It's really the best thing that's happened.

Q Why?

A Why?

Q Yes, why?

MR. HOFFMAN: Your Honor, I object.

THE COURT: Well, if it's going -- if this is going to be resolved on August 1, I don't really need it.

MR. LATIMER: O.K.

THE COURT: I thought you were in a field where the Court of Appeals would not let me venture, anyway.

MR. LATIMER: Your Honor, the Court of Appeals decision is presently under consideration.

THE COURT: No, it's under -- there is a different area of it.

You have applied for impact. I don't know if you will get it or not. Unanimous decision.

MR. ALTERMAN: If we get any decision, we'll be lucky.

THE COURT: Go ahead. I have a verdict, but I am waiting for everybody to come.

Q Now, has the congestion lessened in Kings County over the last past two years?

A Yes, it has.

Q But where is there still the most, where is the congestion still the greatest, and how does that effect an indigent defendant who is in jail?

A Well, I am completing this week a month in Part 3, which is a murder part. I think I did a fair job in helping to reduce the congestion in that murder part, because I had disposed of perhaps 10 percent or 12 percent of the calendar in that month. However, I only tried three

cases, because it's impossible to try more than that fairly inside a month. Maybe four, perhaps even five. We do that by plea bargaining.

The District Attorney, however, has a policy which involves a recommendation, no recommendation, failure to recommend a plea in any felony murder case.

However, in every other case, unless it's a terrible atrocious killing, the District Attorney is offering less than murder, which gives the Court very broad sentencing power and plea-bargaining power.

I did get one disposition from a fellow who flew out, down a few stories down. He was on my trial calendar. He was due to come in on the 10th and he committed suicide a couple of days before. Those things make a terrible impact on us. We are backed up in the murder part, and we have three murder parts.

(Continued on next page.)

Q What would you do to alleviate that backlog?

A Well, I would either increase the number of murder parts or eliminate the murder parts.

Q How?

A By having all of the cases distributed to every other part. This is another way.

Q What is it?

A When I was in Part 1 which was in June, I was able to assign one or two murder cases out to judges who were ready to try cases, but for one reason or another had a couple of days free.

THE COURT: All right, we'll have to interrupt now.

I see both counsel is here.

(Recess.)

THE COURT: All right, Mr. Alterman, you may continue.

Q Judge Brownstein, can people get speedy trials in Brooklyn who want them?

A Well, you would have to define for me what you mean by speedy trial.

Q Well --

A Some defendants don't want --

Q I am talking about those defendants who want

Brownstein-direct

them in Kings County Supreme Court. Can they be tried within a reasonable time?

MR. HOFFMAN: Your Honor, that questions is still rather vague.

THE COURT: No, the answer to it may be general and inclusive but I'll take Judge Brownstein's informed opinion of it as part of the --

A I would have to first define for you what I believe to be a speedy trial.

Q I wish you would.

A I think what Chief Judge Fuld was saying was the six month rule was that a case if it's triedwithin six months would be a speedy trial but I am rather confused by the decision both in our State Court and the Federal Court as to what a speedy trial is. Apparently, the decision says that a speedy trial is one where an order of priority, because of congestion, is tried ultimately without being jumped.

Q Is that realistic?

A No, it is not. A speedy trial in my minority opinion is a trial which is afforded to a defendant without regard to congestion because congestion is really irrelevant as to whether a trial is speedy or not. The fact that a court may be congested, I don't think it's really a great excuse for the State to say, we are not going to give you a

fast, fair trial. I think speedy trial means a fair trial. I think on the other hand that great strides are being made today by a very active and vocal Chief Judge of New York State who in the last session of the legislature really tangled with him by very agressive administrative people like Dave Roth and Ed Bartlett and John Sandafer and Judge Damiani who are demanding what they can of the system that exists, for example, if the defendant is produced in the Court pen, he must be taken into the courtroom.

Q How long has that been in effect?

A That's recent.

Q And --

A And if a judge does not bring defendant into the courtroom, he must explain why he did not. That's new. We have the 299 card which now avoid -- to some degree it avoids non-production. Non-productions were rampant but now that we must fix another date for a defendant for his next appearance without regard to whether it's going to be a trial or not, and so we know he is not going to get lost.

The Probation Department now is compelled to fix a date that is, I fix a date for sentence, and if the report is not ready, the Probation Department makes an application to adjourn it, so that they can finish the report.

I had a defendant who was lost 13 months and

was not produced for 13 months.

Q Well, how can the state deliver speedy and fair justice? Is there a way that you can see that happening and what is the ultimate effect on an indigent person who is in jail?

MR. HOFFMAN: Your Honor, I think --

THE COURT: I think that he wants you to write an opinion for me. I'll listen to it and determine whether it means anything as far as my mandate.

MR. ALTERMAN: Judge, certainly Judge Brownstein who is sitting there everyday --

THE COURT: All right he is going to tell me what they do in a State Court. It's something else what I can do as Federal Judge interfering with another jurisdiction.

A I think, I don't see contact, but perhaps it's really a feel, so that the calendar thing what happened yesterday in addition is I think, what has to happen in our state. I think the judiciary must be maintained as an independent branch of Government and a strong branch of Government, and one which has as much demand upon the state budget for its needs as the effective branch of the Government. We can't do that. Our budget is subject to approval, although there are some inherent rights we have, they are not generally

exercised. We need the personnel to afford us not only a speedy trial but I think it's only one aspect of the fair trial, but the facilities as to the aforesaid aren't obvious but neglected rights for people charged with crimes.

Q Do bails get more as the time gets longer?

A Yes, yes, that's -- we are mandated to a bail review within every 90 days. The District Attorney recognizes that you know the trial is not forthcoming. That is we and the Court recognize that if we continue what we want believed to be a reasonable bail, that we are laying the foundation for a risk, and we reduce the bail.

Q Are those risks a realistic remedy for the hundreds of people still incarcerated pending trial?

MR. HOFFMAN: Your Honor, I object to that question. That's very speculative.

THE COURT: I'll listen. Overruled.

A Well, we don't have that many risks.

Q Why not?

A The remedy is the bail review. We do it automatically. We do it on request by the defendant's counsel, and we have a circuit break involved too and special PA and special ten rather, where we have a Judge who reviews our own determination. It affords counsel an opportunity not to have to go to the Appellate Division.

Q Do you state the reason on the record setting the bail when you do it so the Judge in Special 10 has an idea why you set a bail?

A I do it firstly, briefly, but I do.

Q Has it been in your observation that other judges do the same?

A Yes, many. Many will say, for example the defendant has a predicate felony, and since he is not allowed to plead to anything less than a felony and must get time in jail, he has the higher risk for his not returning. Therefore we fix a higher bail. Some will state the reasons. I try to in every case, but when you are handling 30, 40, 50 arraignments a day, it's rather difficult.

Q How are defendants prejudiced by the long delays when they are spending it in jail, do you think?

A Well, I think my opinion is written in the Federal and State Courts, there is a presumption of prejudice which ultimately leads to the dismissal, 30, 30 dismissal.

Q Has that every happened in your experience?

A Oh yes, of course, yes.

Q Many times?

A Not many times. It has happened. I have had cases dismissed on motion of the District Attorney. As a matter of fact March 13th where a case was long delayed and

the prejudice also occurred to the people's case. Witnesses couldn't be found.

Q Well, do attorneys appearing before you generally ask for or request evidentiary hearings to determine the causes and less of delays to see whether or not you will entertain a dismissal of the motion?

A I had one to date. They are not frequent, no.

Q Do you think that would help alleviate the overcrowding?

A No, because I don't think it will alleviate the overcrowding, because the present state of law is a speedy trial, right to a speedy trial is met head-on by congestion, and it's not going to remedy this situation. The way to get a speedy trial is to afford enough personnel, judicial and non-judicial, enough help to the District Attorney, enough help to indigent counsel to provide for a speedy trial. Now, we have been able to reduce the number of indictments in Kings County and perhaps we can further reduce it by a plan for screening cases.

(continued on next page)

DIRECT EXAMINATION

BY MR. ALTERMAN: (Cont.)

Q How would you do that?

A Well, this is not an original idea with me. It's been considered. I think we talked about it about a year ago, where a Supreme Court Justice would be assigned to sit in Criminal Court and whereby reason of the fact that the defendant doesn't have a particularly bad record. Even though the District Attorney insists upon a felony conviction by plea, if the Court wasn't going to sentence to more than a year, we could send the witness right over to the grand jury, secure an indictment. We could have it brought back to where the Judge is sitting in the Criminal Court acting as a Supreme Court part and take the plea right then and there.

Q Has that happened?

A No, it hasn't.

Q Why?

A Because it's a very tricky plan to work out. You have to have sufficient District Attorney personnel, Court personnel and grand jury personnel really to get those indictments you know quickly. This saves time. This saves the time of witnesses. Saves the time of the defendant and affords other defendants waiting for trial a better chance

of getting a quicker trial.

Q Does the ready rule contribute to delay?

A Well, we really don't have, you know a ready rule that's a fiction. The District Attorney is always ready. The truth is in most cases, he really is always ready. He talks to his witnesses. He has them in the grand jury. If he knows where they are, he has them ready. All the District Attorney has to say is within six months we are ready to go to trial.

Q How does that effect defense counsel's ready rule?

A Well, it doesn't allow him to get a dismissal of the case, if that's what you mean. It's frustrating. I had two lawyers today, clients can't get a trial. The parts are on trial. We are on trial. We are not wasting the judicial man hours. The parts are working. We are turning out 150 dispositions a week, which is enormous. We have gone as high as 200 dispositions a week which is beyond anyone's belief.

Q Are you operating at full efficiency this summer?

A We don't have all the parts open. If most of these Judges feel like I do, we are very tired. It's a busy Court, extremely busy Court. The days of having summer

off is just a vision of the past. It doesn't happen any more. We are operating I think about 20 parts. I think about 20, 25 parts. Every part is working, but some have been combined for the sake of not telling our Judges, clerks, D.A.'s, Court officers.

Q You are familiar with representations afforded by attorneys from Legal Aid Society?

A Yes.

Q Do you think by and large they render an adequate representation?

MR. HOFFMAN: Your Honor, that's such a broad question.

THE COURT: I don't know what issue this is going to relate to that I can act on. I'll let Judge Brownstein answer, though.

A Some of the best lawyers I have seen practice are in the LEgal Aid Society.

Q What about 18B method of representation? You think it's adequate?

A Not every respect. Many respects not at all.

Q How is it not adequate at all?

A There really isn't except for perhaps a half dozen lawyers that I know in Brooklyn, there really isn't any relationship between the lawyers and the defendants. I had,

well this month I had half a dozen defendants who complained they hadn't seen their lawyers in three months.

Q Is that frequent?

A Yes, unfortunately all too frequent. What I try to do in those cases is bring the defendant in and get the lawyer in together in the Courtroom to see if they can resolve their differences and establish a relationship. I am not talking about a case that's on the trial calendar.

Now, we do have 18B assignments in the Criminal Court. I try as hard as I can when it gets to be an arraignment part to continue the same lawyer, if the defendant is satisfied with him.

Q You say in that regard, do you think an indigent defendant has the choice to have a lawyer appointed pursuant to 18B of his own choice if that lawyer is willing to take the case?

A I have no objection at all with that. The problem with that is you are liable to cause much greater congestion by having one lawyer who has earned a great reputation among those in the House of Detention. Everyone wants him, and he has 200 cases himself. If we are going to wait for their lawyer to get free, we might have to wait two, three years for him to get to trial.

Q Will you elaborate a little more on some of the

complaints you received from prisoners about 18B representation?

MR. HOFFMAN: I object. That's all hearsay.

Q In your observation, Judge Brownstein --

THE COURT: Well, I'll overrule.

A General classification of complaints would include failure on the part of the lawyer to come to see the defendant at the House of Detention. Second failure would be the all too frequent complaint that lawyers don't respond to phone calls; either too busy or not in. Another problem that seems to be getting much better is the great rate of motions for appointments of investigators. That now has really improved substantially. Many lawyers did not even bother to hire investigators which we paid for. A failure on the part of counsel to show up on the date that was fixed and agreed upon. The defendant brought to Court and his lawyer doesn't get there.

Q Does that happen frequently?

A Yes, it happens a lot because private counsel is engaged elsewhere on another trial, and it may be a case where, it may be in the Civil Court settling a case or in the Criminal Court getting detained on a case, and I can understand his reluctance to come back for $15 an hour which is all too ridiculous.

6 Brownstein-direct

THE COURT: In 1974 the legislature didn't change that figure, did it?

THE WITNESS: No, not yet. There were bills in. It wasn't changed.

Q No?

A There was a bill in I think for 30 and 20.

THE COURT: That's the Federal rate fixed years ago?

THE WITNESS: Which probably should be revised. I have had many lawyers, good lawyers, competent lawyers who were committed to their defendants, who have refused to take assignments any longer. One of the problems I really hope I am not going to incur the wrath of the Appellate Division. Many of the problems I'll approve a bill of $1,500 and the Appellate Division will reduce it by half, so the lawyer who I certified by affidavit who has certified to me by affidavit and who I believe instead of now earning $15 an hour is now earning $7.50 an hour, and I wouldn't work for that with my government license.

Q Does the Appellate Division give any reason for cutting after you certify it?

MR. HOFFMAN: Your Honor, I object.

THE COURT: I think I can sustain that objection. I really can't do anything about the compensation of lawyers.

MR. ALTERMAN: I am not asking you to, your Honor.

THE COURT: Perhaps I should.

BY MR. ALTERMAN:

Q What effect does the whole 18B system have on the quality of representation?

THE COURT: I'll sustain that objection.

Q Now, you testified before, Judge Brownstein, that in December of 1972 and June of '72, you had these massive conferences. Have you had any such conferences since that time?

A Not at the jail.

Q Have you had them at the Courthouse?

A Well, I tried to make it a practice when I come into a part, I am not so anxious to try cases as I am to learn the calendar and see which of the cases really should not be on the calendar, which should be disposed of, which defendants ought not to be in jail waiting a trial in a case of the nature that he is charged with, and I do that by conferencing perhaps the first day maybe even longer than that. One part I conferenced over a month, two months and

disposed of about 35 cases a week in the trial part. That was with tremendous cooperation of the District Attorney who brought up hundreds of files in the Courtroom, and we worked very late every day and early in the morning to prepare for it.

Q You and any other Judges in the Supreme Court have done that?

A Well, yes after I did it. See it was the kind of a secret calendar. I looked at my statistical sheet that told me I had let's say 250 cases on my calendar, then I looked at the number of cases that I had actually on my printed calendar, and there was a difference of about a hundred and fifty.

Q Where did they come from?

A They were cases which were referred by part I for assignment, but didn't appear on what we called then the ready calendar. They were not even reserve cases. They just didn't appear any place.

The consequence of our looking at the cases resulted in agreement with the District Attorney and Judge Damiani to print on each part's calendar every case in the part and that, for example, would afford me an opportunity, if I am on trial to take an hour each morning, and an hour at the end of the day and conference those cases which are

brand new and came in to see whether a man really ought to plead or not, whether he should wait a year.

(Continued next page.)

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Q Is that your own policy or official policy?

A That's my policy, but it has been encouraged as far back as Judge McDonald. We have had monthly meetings, and he would instruct us at the conclusion of the meeting if dispositions were not forthcoming, take an hour a week, two hours a week, a week a month, to learn about the cases and see what should be tried and what really ought to be disposed of.

Q Any place for anything new? In other words, you testified that the murder parts are still the most congested in the Supreme Court. How are you going to deal with giving those people, if you want to go to trial on murder, some semblance of a speedy trial?

MR. HOFFMAN: I object unless the Judge is sitting in the murder part.

THE WITNESS: I am today. I am sorry.

THE COURT: I am going to overrule the objection.

THE WITNESS: I apologize for --

THE COURT: All right.

THE WITNESS: -- responding. I do that at my place.

A I know that the backlog in the murder part is of great concern to our deputy administrative judge.

Q How many people in the murder part over six months, do you know?

A We have over 300, about 300 cases. I think in three parts. I know I have about 95, 100 cases. I would imagine that the greatest majority of all them, perhaps two-thirds of them, are more than six months old.

Q How come those people don't get bails?

A Many have, but they are not bails that they can reach.

Q Then how are you going to give those people a speedy trial or at least deal with their cases?

A I see only two alternatives. That is either to expand the number of murder parts or abolish them and give every judge a piece of the pie, or, of course -- and there is another alternative, and that is to arrange for cluster parts as a result of which you might have a judge up front with four backup judges, and the judge up front keeping the four judges on trial busy, not with conferences, not with negotiations, not with applications or motions, but just trials.

Q Do you think it would help if the Legal Aid Society got into murder parts?

A It would cure a lot of problems we have with 18b lawyers not being there. They would be there. See, the

defendants frequently -- I have no objection to having Legal Aid assigned to murder cases. I think they are competent. I think they are certainly much more available and having talked to some of them, they would love to do it.

Q Some people accused of murder, have you ever released them into the -- given them bails that they could make?

A Yes.

Q And what has been your experience with their appearance rate?

A Very good. This month I had -- I don't think I had anybody who didn't show up who was on bail. As a matter of fact, they are told not to come. Counsel will show up and will try to fix an affirmative date for trial, and they will be called to come in.

The only one that I paroled this month without any concern was Mr. Hymann.

As I told you today, pretrial services took him.

Q But they hadn't previously to this date.

A This is the first time. I am going to encourage them to do it. A substantial number of people on that calendar will not be convicted of murder, who would plead to manslaughter, first or second degree, perhaps

even assault, some of whom will not go to jail. I have got people who have been convicted of manslaughter along with people sentenced to jail, based on the records and recommendation of the Probation Department.

Q Is an individual's financial status considered consciously or unconsciously when you make a bail?

In other words, someone has bail of $20,000. The attorney for the defense says he might be able to make $1,000. How would you deal with a situation like that?

A I first try to decide, is there a way I can get the defendant out and at the same time assure his appearance? That's the conflict.

If the attorney is asking for a high bail for a serious crime for a man who might have a prior state bail jump, the fact that he is able to make what he would call reasonable bail doesn't assure me that he is going to be back, but there is a problem in the statute.

The Criminal Procedure Law tells us to consider his record and then it tells us to consider, and this is a case I consider the fact that if he has a long record, did he ever jump bail?

Now, that's supposed to be a point in his favor. It would sound silly. It's there. Something we are supposed to consider. I have had counsel frequently

say to me, "I know he has twelve arrests, Judge, eight convictions, never failed to show up. No charge of bail jumping."

I guess it's the past performance we are supposed to consider both pro and con.

Q What is the singlemost criteria in you setting--

THE COURT: Haven't you been on this? You said assurance of return.

Q What weight in the District Attorney's recommendation does reappearance have generally?

A It's a consideration, but the District Attorney generally is concerned, as he should be, I suppose, as an advocate-adversary with the nature of crime and the possibility of success.

At the same time I have had some very good successes, very good relationship with the District Attorney in Part I, with whom I may speak for a few minutes about the case even in the presence of defendant and counsel, and I have arrived at a compromise with him.

We have had a very good District Attorney's office. They are good in their part.

Q You sit in the part where you hear motions; is that correct?

A Yes.

Q How long do motions take generally to get from Part I to trial part if it's referred to the trial part to be heard?

A Referred the same day, but then, of course, the counsel making the motion has to go to the trial part and arrange for it to be heard.

The District Attorney in the trial part who is going to handle it has no idea that the motion has been referred until he is actually told of this, and then he should ask as counsel for defendant should, for the Court to set a date for the hearing of the motion.

Q Could speedy trial motions be heard in Part I or forthwith have evidentiary hearings on them?

A Some are. Some speedy trial motions are heard depending on where the case is, but under the rules must go to the trial part if it has been assigned.

Aside from all that, there is still the remedy of Special X.

Q Is that a realistic remedy?

MR. HOFFMAN: I object.

THE COURT: Sustained.

Q Do people make many speedy trial motions for murder? People accused of murder cases on murder?

A Not so frequently as those not accused of

murder.

MR. ALTERMAN: O.K. Thank you took the time out to come here.

THE COURT: All right, who wants to cross-examine? Mr. Hoffman?

CROSS EXAMINATION

BY MR. HOFFMAN:

Q Judge Brownstein, does delay benefit a murder defendant in some cases?

A I have seen -- yes, I have seen delays benefit defendants. There are defendants who obviously can be benefited by delays, because People are as prejudiced as defendants can be.

Q Is it your experience as judge in the murder part that all of the defendants in the murder part want speedy trials?

A I haven't had any defendant refusing a trial. This month I don't think I recall one defendant who asked for a delay.

Of course, some of the cases are so old that it wouldn't make any difference.

Q How many cases are there in the murder part that you are sitting in at the present time?

A Last time I looked, I think it was 95.

Somewhere a little less than a hundred.

Q And do you know which percentage of those cases the defendant is in jail and in which percentage of the cases the defendant is not in jail?

A I would have to guess, about 55 to 70 percent are incarcerated. Now, I don't know how accurate that is, because our calendars are not accurate as well.

For instance, today I learned a defendant in a 1970 case mailed "Jail" really was not in jail at all. The calendar was inaccurate. I was trying to find him. The Correction Department said, "We haven't got him."

Counsel said, "Who are you looking for?"

I said, "The defendant."

He said, "He is over there." He was out on the other side.

(Continued on the next page.)

Q Of those 65 or 70 percent of cases that are listed on the calendar as jail cases, approximately how many of those cases are more than six months old?

A Well, I think all of the 74 cases are less than six months old, because although some of them --

Now, you are talking about age from day of arrest?

Q From the time that the man was committed to incarceration.

A I think almost all of the 73 cases are more than six months old, of those who are incarcerated. Certainly 72's.

I have a few '71s, a couple of '70s. I even have a 1969 case where the defendant is incarcerated, but that was the result of a reversal.

Q Isn't it a fact that the cases dating from 1970 and '71, of those cases, there have been reversals or other proceedings in the case?

A Some of them. Many are. I really did not this month get to review every case in the part. We try to.

The District Attorney and I try to work it out so that we can see every case, but you people are as short-handed as we are during the summer.

Q Judge, when you are sitting as an arraignment

judge, do you routinely follow the District Attorney's recommendation on bail?

A No, I don't.

Q Now, there are many instances where you set bail altogether different from the figure cited by the District Attorney.

A Yes.

Q What weight do you give the District Attorney's recommendations vis-a-vis the other factors you consider?

A Well, sometimes. It really depends on whether I agree with him or not. He has an obligation to make a recommendation. For the most part, he recommends the same bail that was continued. Of course, he knows. I don't have this information. He knows what the District Attorney asked for in the criminal court.

Now, if he's gotten what he asked for, he will just say, well, same bail continued. If he didn't get what he asked for, if defendant is paroled, he got 2500, and he wanted 10,000, sometimes, and to be fair, not always, he'll ask for 10,000 because your office instructed him as to what bail he should ask for.

So if I have a man before me asking for a bail which he himself personally doesn't recommend, I generally take it with the weight that you get; not

great weight.

Q You testified before that at the present time, but pending shortly, the District Attorney controls the calendar.

Did you mean by that the physical preparation of the pieces of paper?

A No, it's more than that. Of course, it's more than that.

The District Attorney tells me what cases he is going to move. That's control of the calendar. I don't care who types it. That doesn't make any difference to me.

We have cases in the state court which say that the District Attorney controls the calendar; cases involving Judge Fogel, one involving Judge Goldstein, County Court, Kings County, where the Judge dismissed the case because the District Attorney wasn't ready to try, that they wanted to try a different one.

The Appellate Division said, "You are wrong. The District Attorney will say, within reasonable guidelines, what will be tried."

Now, I think the way we are going to clear congestion and the control of the calendar is by having a judge call the calendar and say, "Now, this is an old case.

That's No. 1. The next one is within that group, let's say the first five. Pick any one of the five that you are going to try first, but the next one will be one of the five."

How do we get to a point where we can dismiss a case? How do we find out that a District Attorney really doesn't have a case or witness?

I myself say again, I have had an excellent experience this year with one of the supervising district attorneys, Assistant District Attorney, in Part XIII, where we dismiss about a dozen cases on motion of the District Attorney.

This was refreshing, marvelous for the District Attorney to say, "Judge, this case can't be prosecuted, the witness died, the witness is gone. We just don't have the evidence to sustain a verdict in this case, and we are going to move to dismiss it," and I think that's a terrific way to run the court.

Q In your part, do you ever direct the District Attorney to be ready for trial on a certain date?

A Well, I have perhaps a little different way of operating. I have good relationships with most lawyers, and we sit down at the beginning of the month, and I want to know why a certain case can't be tried, why it isn't

being tried. We have the other side in for the most part, a lot of those cases are not being tried, are not being tried on agreement between counsel. That's not in every case.

Something I wanted to say before I forget, and this is I think relevant to what is going on. That is a directive that has been given to us with regard to cases that -- where defendants are in jail more than six months -- where we have to fill a form out and explain to Judge Diamiami why that case is not being tried or why the man has been in jail six months or more, and what's going to happen to the case. That's why --

THE COURT: How long since then?

THE WITNESS: That's fairly recent. I don't know whether counsel is aware of it, but it's pretty recent, and when I said earlier we have a whole different kind of administration -- one that is an activist administration -- I meant it. These are some of the changes that happened just this year. We are going towards a maximum judicial administration, I think perhaps one that's much better than we are entitled to with the resources that we have, and if it weren't for the dedication of many of the judges, if we just lived by the

the norm, the usual, without trying to excel, we would be in more trouble than we are now.

Q Why isn't it a fact that in your courtroom that the scheduling of cases is a matter of arrangement between yourself and the attorneys rather than the District Attorney's control of the calendar?

A No, no. It is not. It is not a fact. It occurs sometimes. Sometimes it does not occur. I have had experiences in the last five and a half years where the District Attorney said, "I am not going to move this case; I am going to move one that's a little younger."

I won't allow him to move one that's six weeks old as opposed to one two years old. But he -- my understanding of the law is if he wants to move a case on the calendar which he prepared, controls, then he has a right to do that within the guidelines of the decisions of the court; so it is not a radical change from what he should be doing.

Q When you entertain a bail application, do you permit a defendant to address you and tell you about the circumstances?

A Yes, I try to encourage them to. Many will not. Many don't believe us. They think we are not on the level, and perhaps we haven't earned the trust and confidence of defendants.

After all, why should they? We are part of the system that caused them to be incarcerated.

Q You ask the defendant questions about his family or his employment situation?

A Well, frequently by the time I get him there is really very little of his family left and no opportunity for him to get a job unless we have someone that is kind of an ombudsman like PTS, pretrial services, that can help him.

I do. I try to find out whether he sees his family. I try to find out if he got out could he get a job, but his inability to get a job really should not be a bar to letting him out, since I don't think we can compel a man to work in order to be free and out in the streets.

If I believe he is going to return, that's No. 1 on the priority.

Q You testified before that the criminal court judges usually do not indicate the reasons on the record why bail has been denied.

Isn't it a fact that the criminal court judge generally has the same information before him that appears before you in your folder?

A Yes, but I don't know what was important to him. If the yellow back, for example, said, and we have a checklist and on it it says, "Roots in the Community, Family, Employment, Prior Record," and if I were to mark

it from 1 to 5 in order of importance, and I made Roots in the Community 5 points, and Relatives 3 points, I would get an idea.

So the next judge who looked at that would say, "Well, he was more interested in whether he had work. At least now I know what the general view was, or the District Attorney's objections to lower bail."

You know, some indication. There are minutes in the criminal court, but we haven't got them. I have never seen them in the Arraignment Part, and I can understand that very easily.

We have a reporter type 150 sets of minutes a day. Three or four minutes a night. It's impossible to do unless you have four or five reporters serving that one part.

(Continued on the next page.)

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Brownstein-cross

Q Are you bound to follow the amount of bail fixed by the Criminal Court judge?

A Absolutely not.

Q So that would it make any significant difference to you whether or not Criminal Court judges make a written determination and why?

A Of course, of course, it would make a great difference to me. I am not bound to follow it, but I am looking for help and very frankly fixing bail is a great weighty decision to make. Whether a man should be free while he is presumed to be innocent or not comes I think second to the weight that you have to carry determining whether a man should be sentenced to jail or not. We don't have the best of detention facilities. I have been in them, and I would much rather see a man whose record is relatively good or young person home, but one of the problems is that I don't know that he is going to go home, if home hasn't come to Court and told me that; maybe I perhaps rather he not be in his home if I have somewhere else to send him.

Q Do you often set amounts of bail different than amounts set by Criminal Court judges?

A Frequently.

Q Do you often lower the bail set by Criminal Court judges?

A If I think the bail fixed is inordinate, I'll lower it. If I think the bail is insufficient to obtain the appearance of the defendant by the fact that he didn't show up, I'll raise it, but you have to be very careful in the arraignment part before issuing a bench warrant. I have seen it happen all too often where a notice is sent to defendant. Bench warrant is issued, then we find out later that the address that was sent out on the notice doesn't compare to the address that is on the yellow back. For example, I might have 159 Grand Avenue on the yellow back and 159 Grand Avenue on the District Attorney's trial sheet. The District Attorney has Manhattan and New York and I have Brooklyn. It's happened to me. It's happened a dozen times. The address might have been changed since the first appearance in the Criminal Court. He might have moved, and the D.A.'s trial sheet doesn't reflect it, and really it ought not to be the District Attorney's obligation to notify people to come to Court. You are an adversary. It should be our job to do that, but within the concept of your having the calendar obligation, you also have the notice obligation.

Q Judge Brownstein, do you know of your own personal knowledge of people awaiting of all categories of defendants waiting trial in Kings County, is there a greater percentage of defendants who are in jail or not in jail?

A I would have to answer the question in categories that is to say, we categorize, our parts are made up into departments; Part 3, Part 2 and 17 are murder; 4, 5 and 6 etc. are narcotics parts. On those classifications you have different rates of incarceration. Murder is the higher rate of incarceration in general. In 8 parts which don't have murder in it or have narcotic sales, narcotic sales have a higher rate of incarceration because the penalty is much more severe.

Q Well, excluding the murder parts and the specialized narcotic parts with respect to remaining trial parts in Kings County, do you know whether there is a higher percentage of defendants in jail or not in jail?

A General parts higher in general Part 13. That was kind of a Legal Aid general part. I would estimate about, and this is really a guess, about half or perhaps a little less than half of the defendants were incarcerated, but the fact of their incarceration give them a priority to trial. The problems are too many so when we get the priority it becomes academic.

Q Have there been physical improvements in the courthouse which has helped to alleviate some of the congestion?

A Yes, very substantial.

Q Will you describe briefly.

A We used to have one pen. We now have two. One on the third and one on the ninth. The fact of having one pen limited us very severely in the number of people we could produce to service the parts. I hate to put it that way, but that's really what it is. Having sufficient number of defendants to make a part work, having two pens, of course, we are now in a much better position to have fuller calendars.

THE COURT: Do you have a holding cell outside of the courtroom?

THE WITNESS: Oh, no, judge, no sir.

THE COURT: I have a holding cell right outside that door to service my courtroom and Judge Weinstein next door.

THE WITNESS: Judge, in order for me to get a defendant from the fourth, to the fourth floor from the third floor, it takes somewhere between ten and fifteen minutes, because the regulations don't allow the Court Officer and the defendant to walk up the stairs or walk down the stairs. They have to walk to the other end of the building, wait for the elevator and walk all the way back, and it is a terribly time-consuming process. One of the things that contribute to the man being produced and not brought into the

courtroom is the terrible waste of time we have.

Now, I am on the ninth floor now. That's really a pleasure. I can have the defendants five minutes or two minutes, but if you are on the second floor, fourth floor, or any of the other floors except the third and the ninth, there is an inordinate delay in getting the defendants up, but it is certainly a lot better than not having defendants brought at all. We have more courtrooms. I might say respectfully that this courtroom in our building would be about three courtrooms. We have done this. We have done that. We have cut rooms in half, and we have made more courtrooms. There are problems. I must in fairness say I don't have a place to make a phone call on the ninth floor. I don't have a place to sit down with lawyers and talk. Our robing rooms are chambers. I spent four years in a two-room chambers which was adequate for me, but really belonged to someone else. The ideal situation is to have your courtroom and your chambers as part of a complex as this court has where you have a witness room, Jury room and holding pen. My chambers are onthe fourth floor. My courtroom is on the ninth floor. Some of my defendants are on the third floor, on the ninth

floor. I don't have a juryroom onthe ninth floor. My juryroom is on the eighth floor. That creates delays. It's really, it was never designed to be a Criminal Court. It was designed to be a Supreme Court before 1962, a nice quiet place to work and to have jury trials.

There are plans for a new courthouse. I would guess about ten years away, but I understand a really big complex; District Attorney, Probation Departmen, the Court itself, holding pens.

THE COURT: I can't do anything about that Mr. HOffman.

THE WITNESS: Maybe he could get the Federal budget to give us some money.

A Oh, we are opening ten parts.

THE COURT: Mr. Hoffman, what's next.

Q Judge Brownstein, after bail has been set by arraignment, Judge, what is the opportunity the defendant has to have his bail reviewd by other judges in the state court?

A The defendant can make unlimited bail applications. If he is unsatisfied with his result of the bail application of Supreme Court Justice in the trial part or in Part 1, he may appear before the Special Supreme Judge for

bail review. If he is unsatisfied with the results there, he can go to the appellate division.

Q So that he can make a bail application in the conference part, and he can make a bail application --

A I don't know if that's done in conference parts. I used to do it in the conference part because I didn't find authority to the contrary.

Q And can he make bail application in trial part while his case is pending?

A Unlimited.

Q And can he make unlimited bail applications in Special Term Part 10?

A Yes. Well, yes, he can. Generally it is after a denial in a trial part. It's a review process, but that doesn't mean he is going to get relief.

(Continued on next page.)

CROSS-EXAMINATION

BY MR. HOFFMAN: (Cont.)

Q Now, during the course of these numerous applications, is it possible to ascertain the disposition record of the defendant, that is whether he had prior arrests?

A No, it is impossible. It is virtually impossible to find out the record of a defendant until he pleads guilty. You may find out if you are cunning enough what other cases he has pending, what warrants are open against him, and I don't mean cunning in a bad sense. A clerk caught me when I first came into the Court to ask for the corrections department record. I had no idea that it contained all that marvelous information. I found, for example, if a man is wanted by the Drug Abuse Control Commission, I communicated with them and asked, "Look, if I parole him to your detainer, will you communicate with me when he is ready to be put on after care outside of the structured environment so that I can then determine whether I should put him back in and let him continue out." They always say yes and never do it. But I would rather take the chance anyway. Why keep him in at our cost in that kind of condition when he can be in a BACC facility.

Q Judge Brownstein, I would like to ask in your

experience based on trial part experience in the trial parts, I am not speaking about arraignments or conference parts, as the Judge in the trial parts, do you preside over taking of guilty pleas and arraignments of guilty pleas of defendants?

A Yes.

Q Will you contrast the number of instances before a defendant will plead guilty on the eve of trial or at the close of the pre-trial hearing vis a vis the number of instances where defendants will plead guilty without these events occurring?

A Well, statistics I am aware of are that 95 percent of the people plead guilty. I would suppose that about 25, 30 percent plead guilty in the conference part. Of the remaining, of course, everyone else pleads guilty in the trial part except for those who are recycled. We have a recycling process where we take the cases back out of the trial parts when they begin to get a little moldy, and I give them to Part I, AA Judge and it's really recycling. We just do the same thing over again. Hopefully, the defendant might have changed his mind, might get a better offer, reconsider and take the plea. I can't give you percentages. It is not an enormous part. It is a small part. A small number of defendants plead guilty at the eve of trial. That

is a lot of defendants plead guilty when you bring a jury into the Courtroom, but theyrepresent a very tiny part of those who plead guilty.

If our disposition record was based on the number of pleas taken when the jury is brought into the Courtroom, we would be even more congested; perhaps ten times more. Most of the pleas are taken in the trial part when you have an opportunity to conference a case during a trial while the trial is going on. It isn't really that many, not in my experience, but it is a good device sometimes when you think a defendant is holding out for a better offer to bring the jury in. I use the same jury one day three times and got three pleas.

Q You testified that in December of 1972 you conducted conferences in jail and that out of a total of 250 jail cases you took60 guilty pleas.

A No, 60 pleas of the total calendar, but the greater part of the 60 of those were in jail.

Q Was it necessary to conduct those conferences at the jail or could you have conducted all these conferences during the regular session of your trial part?

A It would have been impossible for me to take care of this during the Christmas holiday when we were working principally because I would have to add 210 people

to the pen space. If I did that in eight days that would have been somewhere over 30 people, and the most logical thing to do is let them stay over in the Men's House and do it there. We have a Courtroom. It is not the nicest place in the world.

THE COURT: I have been there.

A But it is okay. The most important thing about going to jail -- I can't explain it, because I don't have a psychiatric background. It seems to be some facility for people to feel more at ease. I am talking about defendants. They have an ability of communicating with the Court much more easily. They can express themselves with more understanding. Perhaps if that isn't so, it is just that maybe I hear better and understand better myself while I am there. A greater impact is made on you in the jail as to what your relationship is to people than in the Courtroom.

Q Those were all cases being carried in your trial part; is that correct?

A Yes.

MR. HOFFMAN: Judge, I am finished.

THE COURT: All right, Mr. Weber, have you some questions?

MR. WEBER: Just a couple.

CROSS-EXAMINATION

BY MR. WEBER:

Q Judge, you were talking about losing inmates prior to 2994. Will you explain again the situation subsequent to the institution of that form?

A We are required now with every defendant who appears in the Courtroom, who is incarcerated, to fix a date for his next appearance. That date is written down on a card about the size of a large index card with information which travels with the defendant and informs the correction department of his next Court appearance. This helps you to avoid the preparation of recall sheets. It allows the correction department to estimate approximately how many people on a particular day are going to be required in Brooklyn Supreme Court and have facilities available to produce them. It is an opportunity for defendants, I suppose, to say you know, hey, I was due in Court today. According to my 299, you didn't take me. Can I get over there?

Q I suppose it creates a problem of unnecessary appearances?

A It does, but I don't think a defendant is unhappy about getting a chance to see his lawyer, perhaps wave to his family or get a Courtroom visit, which some of

us give, to talk to a Judge, to give a bail review and just have somebody know he is alive and he is on the calendar.

Q Would you say there are a lot fewer inmates that don't show up as a result of this, or are lost as you say?

A Yes. The nonproductions have been sharply reduced, but not eliminated.

Q The inmate knows when his return date is once he appears on X date. He knows when the next date is.

MR. ALTERMAN: If he knows.

A It is on the record. I don't know how the other Judges do. It is on the record. The Clerk endorses the next date. Sometimes it is in error. It is human error. You can't help that.

MR. WEBER: I have no further questions.

THE COURT: Redirect examination?

MR. ALTERMAN: Yes.

REDIRECT EXAMINATION

BY MR. ALTERMAN:

Q Who benefits most from how long the Court delays?

THE COURT: What was the question?

Q Who benefits the most from long Court delays?

MR. ALTERMAN: Mr. Hoffman opened the door and

asked, does defendant benefit from Court delays. I want to ask the witness.

A No one benefits. I think the District Attorney is able to cope with the problem caused by long delays, if that is what you mean. The District Attorney can much more easily find a witness than defendant.

Q You refer to the directive. When does it go into effect? I think the directive was bringing people into the Courtroom?

A It is in effect now.

Q Judge Brownstein, would you consider your practice typical as every other member of the Court?

A I can't answer that question. Well, I would rather not.

THE COURT: You have brought the best Judges here, haven't you, Mr. Alterman?

MR. ALTERMAN: Me, yourHonor.

A I have to say each of us in his own way, to his own conscience, to his own intellect works as hard as each of us can. If we didn't have the dedicated Judges we have, we could just close the Courthouse. Our production record is just unreal, something that no one can believe.

Q You testified with the new system, defendants frequently get bail reviews. Is it a common practice for

Judges to frequently review their own bail settings?

A Yes, yes of course, if you are in a part for five months, you have to review your bail at least once.

(Continued next page.)

Q Would you change your own bail terms?

A Yes, I have.

Q Would you require new evidence to be before you?

A No.

Q What motivates you to change them?

A Delays and sometimes consent of District Attorney. Realistically the case wouldn't be tried for a long time and maybe he reduces the bail.

Q As a general rule in terms of practice as a Supreme Court Justice, here is a guy remanded after arraignment in Supreme Court. Does he generally get out during the pendency of his case?

A You mean before sentence?

Q Yes.

A Sometimes, sometimes, that depends on how low his bail is reduced and what resources he has and whether or not other resources are made available to him like pre-trial services.

Q Pre-supposing pre-trial service is not fully in Supreme Court, do people who are remanded generally get out during the process?

A No.

MR. HOFFMAN: Your Honor, that's a very speculative question. Asked and answered.

THE COURT: No, I'll take the answer.

A The answer generally is no.

Q Now, do you think that ultimately affects their ability to plead or not to plead guilty?

A Their motivation or their ability?

Q Their ability.

A Well, they are always able to plead.

Q In other words, what factors? Is long-term incarceration a fact that causes someone to plead guilty?

MR. HOFFMAN: I object to that. That's the operation --

THE COURT: I don't know. If the Judge thinks he can answer that.

A There are a small group of people who by reason of frustration and long-term incarceration just plead just because they want to get the thing over with. I have heard that phrase time and time again. A man will plead guilty, then in taking of the plea, I'll ask him what he did. Sometimes he says, "I haven't done anything." I say, "Why are you taking the plea?" He says, "I just want to get it over with."

Of course, it is a factor considered by the Court also in negotiating plea bargaining. If a man has a lot of time in, I consider in that time served, if you can compute sentance out which would be perhaps a little less than if he had taken the plea a little earlier.

Brownstein-redirect/Alterman

Q What does that do to presumption of innocence?

A Well, I wouldn't take the plea if he says he is innocent. That's the point. My policy with almost no exception is not to accept a plea of guilty from the man who tells me that he is not guilty. I know United States v States has said that a man has a right to plead guilty even if he is not guilty, but it doesn't say that a Judge is compelled to take such a plea.

Q Isn't that a fundamental dilemma for the Courts then?

MR. HOFFMAN: Objection.

THE COURT: Sustained. You're getting philosophical.

Q Do District Attorneys frequently move younger bail cases over older in your experience, and what is the reason if they do?

A Sometimes they do and if they do, I like to give the benefit of the motivation simply that that case happens to be ready, and rather than kill a day or two in Court for the Judge, they move a short bail case while waiting to get a jail case ready, but it is our obligation, and I think we do it rather successfully, to try and get jail cases tried.

Q What does that do in terms of notice to defense counsel? If the younger bail case is tried before an older

jail, are you, in your opinion -- not your opinion, but in your observation as Trial Court Justice, are defense attorneys generally prepared? Like Legal Aid attorneys, perhaps all his cases at the same time?

A Well, I have, you know, investigative resources too. I don't think it is on par with the District Attorney, but the way it generally works, if a trial part, Legal Aid lawyer knows his case, he is familiar with it, he's taken it through the Criminal Court, arraignment part, conference part, had his investigator working on it, and he, just like the District Attorney, will fake it, and they begin picking a Jury and telling everybody available to get the cases ready. He picks a Jury. By the time the District Attorney has the case in, he is fully prepared.

Q What about defense cases. Is that day enough time to get his witnesses?

A Legal Aid?

Q An 18B?

A Legal Aid more than 18B. 18B needs time.

Q Well, ultimately what is the effect then on clients?

MR. HOFFMAN: Objection.

THE COURT: Sustained.

MR. ALTERMAN: I have no more questions. Thank

you.

THE COURT: All right, I want to ask one question.

I think Mr. Alterman may have referred to the new form that you said Justice Damiani requires about six months old cases, when did that rule come, when will it go into effect?

THE WITNESS: I got a memo on it I think about three weeks ago, perhaps four weeks ago. I think a form is going to be prepared. I got the memo telling me about it, and I was advised that a form would be prepared and circulated. I don't remember getting the form. It is a kind of an attempt at making us accountable for delays, making the Court accountable, find out why it isn't. If defendant does not want a trial, we have to indicate it. If the District Attorney can't afford a trial to defendant, we have got to say generally why hasn't this case been tried.

THE COURT: All right, anything more of Mr. Justice Brownstein?

MR. HOFFMAN: One question.

CROSS EXAMINATION

BY MR. HOFFMAN:

Q Have you ever forced defense counsel to trial

when they were not prepared?

A Not if they were truly not prepared, but if the claim was they weren't prepared, if after a conference I have seen that they have everything or they should have had everything. You know there is a problem of getting hearing minutes. It's being dealt with pretty well, but they present a problem where hearing minutes -- you know, lower court hearing minutes were not ordered until the day of examination. I have compelled People to go on trial without them because they have had a year to get them.

THE COURT: Thank you, Justice Brownstein. I appreciate your time coming here.

Now, we will adjourn to 10:00 o'clock Monday.

MR. LATIMER: Your Honor, may I make a request? We have Mr. Foy scheduled as the next witness after Justice Brownstein.

THE COURT: We have to have Mr. Ryan and Mr. Foy back on Monday, and I think I have writted several other people for the 29th.

MR. LATIMER: That's why I would ask for a half-hour to examine Mr. Foy.

THE COURT: How long is it going to take to cross-examine Mr. Ryan?

MR. HOFFMAN: I don't think it will take too long,

then there may be some redirect.

THE COURT: I have somebody waiting with an order to show cause. I have to review, and I have to get dictation to him tomorrow morning.

I think I am going to adjourn now.

MR. LATIMER: Your Honor, Mr. Foy, whose testimony can corroborate some of the things that Mr. Justice Brownstein spoke about, I have been advised has a Court appearance in Brooklyn Supreme Court on Monday and given that I am not quite sure when else we can fit him in.

THE COURT: Maybe he will be here Tuesday. If I have to sit Wednesday, I am not going to take it now. Mr. Hoffman has a right to cross-examine and five minutes always takes more.

MR. LATIMER: What about Mr. Ryan?

THE COURT: We will get Mr. Foy back on Tuesday if he is not back in the State Court and Mr. Ryan here on Monday, and the rest of your schedule will then follow pretty well.

MR. LATIMER: Thank you.

(Whereupon, Court recessed until Monday, July 29, 1974.)

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MR. LATIMER: The plaintiffs call Dick Ryken to the stand.

We will like to call Mr. Ryken as the Court's witness for pretrial services agency, and we will gladly stipulate with the defendants that they may have the same latitude on their examination.

THE COURT: I'm not too strict on that, anyway. Come forward, sir.

D I C K R Y K E N, having been first duly sworn by the Clerk of the court, took the witness stand and testified as follows:

THE CLERK: State your name and spell it for the record, please.

THE WITNESS: Dick Ryken, R-y-k-e-n.

DIRECT EXAMINATION

BY MR. LATIMER:

Q Can you tell us what your present occupation is?

A I am presently employed by the Institute of Justice as Adviser and Consultant. I was Director of the Pretrial Services through the 31st of May.

Q How long have you been with Pretrial Services Agency?

A Since its inception. I have been working on it for almost two years.

Q When did the pretrial services agency begin operation?

A The actual operation of interviewing prisoners started June 4, 1973.

Q Can you tell the Court what the function of the Pretrial Services Agency is?

A The function is to furnish information to the court for use in bail evaluations.

The original objective of the agency, under the funding proposal, was to obtain the release of more defendants on their own recognizance and reduce the skiprate.

Q This has been functioning in the Brooklyn court since last June for over a year, now?

A Correct.

Q Geographically, where does the agency function?

A Geographically, the offices are at 56 Court Street, and the interviewing takes place in the basement of the Criminal Court building, various police precincts, and in some cases, houses of detention and Rikers' Island.

Q What type of services does the agency provide?

A BAsically, there are four divisions of the agency.

The first and most important, as far as the resources and the people affected, are the hour-by-hour

evaluations.

Secondly, a supervised release operating on a limited number of defendants and a followup program utilizing community support and third, a services office, trying to offer assistance to those awaiting pretrial interviews, held in detention, and fourth, a research arm correlating the statistics and the management of the agency and having things available for such testimony as today.

Q Can you describe the process by which you first come into contact with a person arrested up through the arraignment in the criminal court? Can you explain how your agency functions in that process?

A The first contact with the defendant can be either one of two places; in a police precinct, if it is between the hours of midnight and approximately six in the morning, or in the basement of the Criminal Court building in the holding area.

We have a crew working 24 -- a staff working 24 hours a day, and for people brought in and held in certain major holding areas in precincts, we go to two or three precincts a night and interview people there.

It consists of an interview, gathering approximately two pages of detailed information of the defendants' employment, family ties, his length of residence in New York,

along with incidental information as to military background and things of that nature.

The information is then attempted to be verified with nearly all verification done by telephone if the defendant has family or friends who are going to come down to the arraignment but who are unavailable to come to court.

Otherwise, we goto the courtroom and attempt to verify that way.

We also use a cross-reference telephone index where the individual has no telephone, in contacting friends or family and things of that nature.

Once the information is verified, the point system is applied, and if a person reaches a total of six points on the point system and the information is verified, he is recommended for release on his own recognizance because of the ties to the community.

There are two other things I left out, going into the point thing, or one thing -- his prior convictions, not open cases but prior convictions.

Points are given for no prior convictions at all and points are deducted for prior convictions.

If we are not able to verify the information because no one is home, then we put on a qualified stamp that this person qualified for release on his own recognizance

based on the information we have.

In other words, "if everything is true, we go along, but, Judge, we don't know if it is true or not. You have to make that evaluation."

If the person doesn't come up with the total points, it is stamped space blank, no recommendation whatsoever.

"Interviewed and completed" is a situation where the defendant does not respond to the questioning.

One where there is a warrant outstanding, we interview but make no recommendations and those situations with no fingerprints or previous fingerprints, we make no recommendations.

Q You spoke about taking into account prior convictions but not open cases.

How do you obtain the information about prior convictions; from what source?

A We have the same information as the Court has; the information from the NYSIIS reports. I think it has a new name --

Q That is the new name.

Have you been able, since the agency has been in operation, to compile your own information about prior arrests and convictions?

A We have our own information system. We have a computer operation and for people arrested since June 4, 1973, in Brooklyn, and processed in the Brooklyn court, we have our information which we can recall at the time of arraignment.

So, in a limited number of defendants, we do have that.

Q Do you furnish this information to the Court at the time of arraignment?

A Yes, we do furnish it.

Q Now, you talked about verification. Exactly what does verification of the ROR information consist of?

A We try to contact someone who knows the defendant or is a relative of the defendant and we ask non-leading questions regarding the information the defendant has furnished and we elicit a response thereto.

If the information is conflicting, then the defendant is not recommended.

If the information is in accordance with what the defendant has said and the point total, a recommendation is made.

Q Now, can you tell us, based on your experience as director of the program, approximately what percentage of the ROR sheets, your reports are recommended -- what percentage are qualified but unverified, and what percentage are

stamped space blank?

A Approximately 43 percent recommended and verified. Approximately [illegible] percent, I believe, are qualified, and the stamp space bla[illegible] about 20 percent, 15 to 20 percent.

Q I will lump the other categories under miscellaneous.

A Approximately 15 to 20 percent there.

Incidentally, the findings are in the exhibit admitted in the thing, exactly.

Q Okay.

Now, this sheet is prepared by your investigator or interviewer and is verified or attempted to be verified.

To whom does the information go at the time of arraignment?

A The information is attached to the court papers, a copy given to the District Attorney and the defense attorney, and there is also a copy in the possession of our representative sitting to the left of the judge in the criminal court.

Q What is the function of your representative at arraignment?

A Merely to be able, in case of questions, regarding verifications, or if the Judge wants additional information or additional things happen in court -- for

example, a person may refuse the interview below but then in court they state that he or she wants an interview, so the judge can make a decision on bail and the Court will ask us to bring someone up to court or into the holding room .

If you have an ambiguity such as two different addresses all reflected on various papers and it might be a public housing opening on two streets and our representative might be able to point that out to the court, our representatives serve in case they are needed.

If someone is brought up and the Judge states, "I'd like to ROR you but you'd probably go out and get drunk again," our representative at that time can say, "We will try to provide services to get this person into an alcoholics program or provide housing. "

Q This is done at the criminal court arraignment?

A Correct.

Q Now, again, based upon your experiences with pretrial services, the agency, at criminal court and arraignments, can you tell us what factors the arraignment judges usually rely upon most heavily in making their bail determinations?

A Well, I think that there are three factors; the nature of the charge, the prior record of the defendant and our recommendations.

Q And, if you know, which of those does the court rely most heavily upon?

MR. HOBBMAN: Objection.

THE COURT: Sustained.

MR. LATIMER: I withdraw that question.

BY MR. LATIMER:

Q Now, at arraignment, can you tell us what percentage of those recommended for release on recognizance by the agencies -- approximately how many are in fact released by the Judge?

A At the initial arraignment of those who remain to have a bail set -- well, there are certain cases pled at arraignment and not taken into account in the figures; approximately five percent.

Q Of those qualified and not verified?

A 46 percent.

Q Stamp space blank?

A Approximately 20 percent.

Q Now, can you tell us what the skip rate is for all persons ROR'd in arraignments?

A The appearance skip rate -- are you requesting a willful skip rate or aggregate?

Q Give us both.

A This is the percent, aggregate, which accounts

for any appearance a person misses, whether held in jail, hospital or other. That is approximately eight percent for all persons, and the ROR skip rate of defendants who come within 30 days have amiss, without trying to evaluate the strength of their excuse, without being brought in by armed people, that is approximately four percent.

Q In terms of those recommended for ROR, what is the skip rate?

A Approximately two percent.

Q And for those qualified but unverified?

A I believe approximately five.

Q And for those with stamp space blank?

A Somewhere in the nature of seven or eight percent. I can give you exact figures if I can check my notes.

Q Do you have your notes?

A Yes, I do have them.

Q Okay.

A I will just refresh my recollection.

(Pause)

(continuing) I was correct. It's two percent, five percent and seven percent.

Two percent recommended, five percent for the qualified and seven percent for the stamped space blank.

Q Are you familiar with a report introduced in

evidence dated May 15, 1974, covering the period, April 1st to April 26 of this year?

A I am.

Q And are you familiar with something mentioned in that report called an expanded release situation?

A Yes.

Q And can you describe what is meant by "expanded release" and the outcome of that program?

A Through a happenstance, without any organized program, a criminal court judge in a period in February, released a very high percentage of defendants, ROR, compared to the normal percentage.

Normally, our release rate of all people is between 42 and 43 percent, and during this period of time, 66 percent of the defendants appearing before this judge were released ROR, at the judge's request, after we came up with the study of the skip rate during this expanded release period, as compared to the normal release rate.

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Q Can you tell us what the results of that study were?

A There was no valid statistical difference. I believe the percentage was 8.5 percent in one case, and 8.7 in the other case, in the aggregate skip rate.

Q What about the willful skip rate?

A The willful has not been correlated yet. In essence, 50 percent higher number of people were released without having any increase in the skip rate percentage.

Q Would you conclude, then, that there are people who could be released who are not released?

A Absolutely.

Q Now, can you tell us, with taking a person who has been released ar arraignment on his own recognizance, what procedures your office, your agency follows with respect to that person; what you require of that person?

A Yes. The defendant is instructed in court and is furnished with a card requiring him to check in with our agency within 24 hours of his release.

The purpose of the checkin is to make the defendant realize that somebody is concerned with his return to court; also make sure that the defendant understands from the hurried situation in the arraignment court exactly when his next court appearance is and where it's going to be; for

our own information, to recheck the addresses that we have for the defendant to make sure that they are not formal mailing addresses but actually places where we can locate him if we have to locate him, and to also try and get some sense of feeling on the part of the defendant that if there are problems, he should come to us, rather than just letting them slip by and not appear in court.

If the person does not check in within 24 hours and the court appearance is more than 10 days away, then a letter goes out to the defendant, stating that he's already violated the condition of his release and requesting that he acknowledge the letter immediately upon its receipt.

If the trial date is less than 10 days, then we attempt to contact the defendant by telephone, or if we are unable to do that, we have 13 area representatives who are essentially neighborhood people who live and work in various areas of Brooklyn, and they try to contact the defendant in person, just to find out why he didn't check in, to establish this initial contact.

In addition, prior to every court -- subsequent court appearance in the criminal court for the defendant, a letter is sent out ten days prior to the appearance, telling him of his appearance and requesting acknowledgement of the letter.

The requirements for the acknowledgement is that we found many defendants who stated, probably correctly, that they didn't receive their mail in a number of areas, that it was either stolen or they didn't receive it.

If no response is made by a check in within five days of that, then we attempt to contact the defendant by phone, and once again without area representative. This is prior to his missing the Court appearance.

Q Now, of those who are recommended by the agency, by Pretrial Services, and who are ROR'd, what percentage are you able to conact within that 24-hour period, initially, what percentage contact you initially?

A We have initial contact either through response to our letter or by the phone call or something on approximately 80 percent for these people whom we recommend.

Q And of those whom you do not recommend, what is the percentage?

A The percentage is something in the nature of 25 to 30 percent.

Q Now, you have people --

A Incidentally, justso it will be clear, we provide the same services, as far as the followup and everything, on people, whether we recommend them or not; anybody that is RORd receives exactly the same services.

Q So that your agency, in essence, conducts followup --

A On everybody, that's right.

Q -- on everybody who is released on his own recognizance?

A That's correct.

Q Now, there are some people who, after the arraignment, for whatever reasons, will be remanded to the jail, and there are going to be some of the people who are qualified but unverified.

What steps does your agency take with respect to those people?

A Well, there are several possibilities on it: one of them is on a limited number of defendants, we attempt to obtain additional verification and to get back to the court, either at the 72-hour hearing or at the next time we are able to get back in with it, and change the "qualified" stamp either to an upgraded "recommended" or a downgraded "no recommendation" based on the fact that we find the information is in conflict or not correct.

That is done, as I say, itself with a limited number. There are approximately 25 to 30 cases a month that we are able to do that with.

Q When you verify the information between the time

of arraignment and the time of preliminary hearing, what is done with that information, who do you notify about it?

A The information is given to the judge at the next hearing the defendant has, and to the district attorney and to the defense attorney, for use at that hearing.

Q Has there ever been an occasion when you had either at arraignment or at the preliminary hearing somebody whose report is qualified but unverified, and you have been able to verify that information in the courtroom while either in the course of the arraignment or shortly before the arraignment?

A You usually are not able to do it in the course of the arraignment, but we have very often situations where we will send the court papers up marked "qualified" and then after that, be able to verify it, either by telephone or in the courtroom itself, and then we have stamps in the courtroom and we will actually change the stamp on all the papers in the courtroom itself.

Q Have you ever had information verified after the preliminary hearing?

A Yes.

Q And can you describe what the agency does in that situation?

A Well, it's the same situation, just at the next

hearing, the defendant has tried to furnish that information to the Court and to the district attorney and the lawyer.

Q Would you say that most of the defendants whose information is going to be verified are verified by the time of the scheduled preliminar y hearing, in most cases?

A It would be hard to say, because it depends on whether a preliminary hearing is held within 24 hours, as it sometimes is when a person is held, or if it is held in 72 hours.

If it is held in 72 hours, in most cases you are able to verify it, and you would, but in a lesser period you are frequently not able.

Q But that 72 hours in general is a sufficient time to verify your ROR information?

A For verification, yes.

Q Does "pretrial services" perform its ROR fun c-tion in the Supreme Court?

A No. The only function that's performed in the Supreme Court is our initial recommendation which goes with the court papers and is, I have been told by Supreme Court judges, used in their decision at the Supreme Court level.

Q But you don't pick up new ROR people in the Supreme Court?

A That's correct.

Q And you don't follow it up?

A That's correct.

Q In the Supreme Court?

A That's correct.

Q Now, you testified that another function, another service you performed is the supervised release program. How is the -- or on what basis is the determination made to accept a candidate for supervised release?

A In the criminal court -- well, in both criminal or supreme court, we will respond to requests by a judge to look at a case and try to make an evaluation; in the Supreme Court we will respond to a request by a defense attorney to investigate a case, or the district attorney, if the case should arise, also.

In the criminal court, we do initial screening ourselves from the people who are not released from our own questionnaires, and try to pick out the cases that we think are the most valid, given the limited staff that we have.

Q What criteria do you use in your own screening to determine whether you are going to select a person for supervised release?

A We attempt to select a defendant whom we feel would not be released on his own recognizance without some type of supervised release, which means that our supervised

release candidates are more than 90 percent felony cases.

We attempt to select a case in which we think there is a reasonable chance for release, where the case itself is not of such an aggravated nature that the Judge is apt to refuse to release the person, no matter what type of program you come in with.

This is done merely in the interests of using the staff to the best utilization that we can make up with them.

We attempt to take people who initially were recommended by us, and were not given ROR, or were qualified by us and were not given ROR.

In rare cases we may go in with a blank situation, but usually it is somebody who is recommended or qualified initially by us.

Q Can you tell us what bail in general, or the average bail fixed for somebody who you select for supervised release, is?

A Up until this time of the approximately 200 defendants we have had, prior to their release to us, the average bail has been approximately $2,000.

Q And you have now made the determination that, at least initially, you think somebody might be eligible for your supervised release program -- what does your staff do

once that determination has been made?

A If there is a private attorney involved, we contact the private attorney and get permission to talk to the defendant, either at Rikers' Island or Brooklyn House of Detention, and if it is legal aid that is involved, we have an agreement with Legal Aid whereby we can talk to their defendants.

We go out and interview the defendant and go over much of the same material covered in the initial interview, checking once again for the consistency of the answers.

We get some additional information regarding specific needs of the defendant, the types of job training that might be involved, prior skills and things of that nature on a defendant; more into his health and things that might be needed in that way.

And the information is then verified once again to make sure that it is correct and the counselor attempts in his own mind to set up a program that will give the defendant additional support, as far as getting him back to trial on time, and one that will be apt to convince a judge that it is a good risk to release the defendant also, and to put together this type of a program, utilizing community groups whom we have solicited to work with us -- we have between 125 and 150 Brooklyn community groups,

including such things as the Long Island Hospital, Bedford-Stuyvesant restoration, a number of individual churches and things of that nature, Catholic C harities -- and we attempt to put together an individual package forthe defendant.

In every case, there will be a counseling session set up at least once a week. If the defendant has a specific problem which he has told us about, such as alcoholism or drugs, something of that nature, the counseling will be directed towards that problem.

If the defendant has no specific problem, we will still set up a counseling session, merely to have somebody establish a closer tie with the defendant so the defendant will have somebody to turn to if he does have additional problems, and there will be at least some type of rapport built up.

In addition, in every case there will be a checkin requirement of at least once a week or maybe more times a week in which the defendant is required to call somebody and just let them know that they are around and getting along okay.

The other things will depend on the individual needs of the defendant. Maybe such things as getting enrolled in high school equivalency training, looking for a job, entering an alcoholism program, counseling, particularly in

the case of parents and sons and daughters who are having difficulties -- there may be counseling in a mental health center or counseling by a church, or something of that nature.

We try to fit the counseling to the defendant's own needs and own desires. In other words, we will not attempt in a case where we have, say, a Puerto Rican who doesn't get along with Blacks, or vice versa, will obviously not attempt to send them someplace where they will be uncomfortable, or to send somebody to somebody who is going to be talking over their head.

(continued on following page)

DIRECT EXAMINATION

BY MR. LATIMER (Cont'd):

Q You testified that you have well over a hundred community groups involved with the program.

Can you tell us just generally the categories of services that the various community groups are able to provide for people?

A Job training, education, counseling, check-in services, specific rehabilitation in the case of alcoholism or drugs, mental health assistance.

I think those are some of the main ones.

Q The provided a full range of services?

A We try to cover anything that comes up, lodging, housing.

Q Have you actually taken people under supervised release and provided housing for them?

A Yes.

Q Can you tell us approximately what percentage of people who you recommended to the Supreme Court for supervised release are actually released?

A Our presentation to the Supreme Court resulted in about 70 per cent success rate.

Q Now, can you tell us what the most serious crime that a defendant release, in the supervised release

program, can be charged with?

A There is no limitation on the crime itself.

Our limitation is based on the facts and the needs of the individual defendants rather than the category of and A felony or anything like that.

We will go in on any case that we think is correct. We will also not go in on a case where a Judge asks us to go in if we don't feel right with it. We will accept services for the Judge, but we will not accept responsibility for someone who we feel will not carry out the things. We will comply with what the Court wants, but we reserve the right not to go carte blanche.

Q In terms of Criminal Court practice and Supreme Court practice, where has your -- the supervised release program found a greater acceptance?

A Our numbers are almost 50-50, but we have a more successful rate and more efficient rate and better utilization of our counselors in the Supreme Court than in the Criminal Court.

Q Can you tell us what you attribute that to?

A I think there are two or three reasons: One is that you -- by the time a person gets to the Supreme Court, the chances of a plea bargain are less and the chances of them being able to raise bail are less, so therefore we don't

run into a situation where a package is prepared and the person plea bargains out or posts his own bail and wastes the counselor's time for several days.

In the Supreme Court, a Judge is more apt to release a defendant because he knows the defendant is probably going to stay in.

In the Criminal Court where a person has only been in for a short time, the Judge things there is still a chance he's going to post his bail on it and therefore he's less apt to do it.

We also find that there is less resistance from the District Attorneys at the Supreme Court level than there is at the Criminal Court level.

This is based on the fact that at the Criminal Court level, my opinion is that the experience level is lower and things happen at a quicker pace and the District Attorney is somewhat afraid to take a chance and not oppose releasing somebody ROR, whereas in the Supreme Court we find that there are in most cases -- there isn't opposition from the District Attorney.

Q Have you ever worked directly with either Legal Aid or other attorneys in preparing a supervised release package?

A Yes.

Q You have?

A The agency has.

Q Now, can you tell us whether people who have been released in Criminal Court to the agency under your supervised release program, and they then get to the Supreme Court, they are indicted and get to the Supreme Court stage, what does the Supreme Court do with those people at that stage, at arraignment?

A It is the same as it is in the basic ROR thing. If they are released in the lower court, they are normally continued on release in the Supreme Court.

Q So that the Judges will tend to continue that program?

A Yes, that's correct, with rare exceptions.

Q Now, you continue to provide this service for how long during the pendency of a case, the release functions, supervised release functions?

A All the way through to the time of sentencing, or the time of the disposition of the case, however it is disposed of.

Q Can you tell us, of the people who have been released in this supervised release program to date, how many have gone through to one disposition or another?

A May I refresh my recollection?

Q Certainly.

A We have had 115 terminations from our program, which does not necessarily mean successful disposition of the case.

Q Can you tell us what those terminations were?

A Approximately a third of the terminations, or approximately 20 to 22 per cent of the over-all defendants that we have had come into the program, have been what we call unsuccessfully terminated; they have been remanded either for being re-arrested or for having failed to appear for a Court appearance, or failing to comply with various conditions.

The percentage re-arrested of the total defendants that we've had come before us is approximately five per cent.

Q The total non-reappearances?

A The total of those who have either not appeared or have violated a condition and are still -- or were out, we weren't able to bring them back in, are approximately 13 per cent of the total defendants who have appeared in the program.

Actually, it is 23 of the 100 and 15 terminations, but you actually have to take it from the 187 since they are still in the program.

Q Now, how many people's cases have gone to

disposition of those released and continue the program through that?

A About 25 per cent of the defendants that we've had come in and 45 defendants have gone through to having their cases terminated.

Q And of those 45 defendants, how many have received a jail sentence?

A One defendant has received a jail sentence on the initial charge and one other defendant had his charge tied up with another charge and received a jail sentence for the combined, so two out of 45 dispositions have had jail sentences.

Q Now, I would like to go back a little bit to the ROR function.

A Excuse me, I want to make sure I am correct.

Those 45 are all cases in which there are convictions or please. They don't include dismissals, and so on. We have had 26 additional ones who were dismissed on their cases, or released in that line.

So you had 45 who actually were convicted or pled to the case and two of those 45 received a jail sentence.

Q And the balance, I take it, received probation?

A That's correct. Or a conditional discharge.

Q Going back to the initial Criminal Court

arraignment, are you able to complete the disposition records from the NYSIIS reports, update that information, prior to the atraignment or does that necessarily go to the preliminary hearing stage?

A Only in a limited number of cases, only in those which we have the statistics ourselves based on people who have been arrested since June 4th in Brooklyn.

We have no other resources.

Q And in terms of the ROR function, does the type of crime enter into your determination?

A No.

Q so that you would recommend, given all the other factors and verified information, you could conceivably recommend somebody who is accused of an A felony?

A Yes, absolutely. We recommend approximately the same percentage of A felonies as we do B felonies.

Q Now, there are people who are awaiting trial in Supreme Court, Kings, who were in the Ossining Correctional facility.

Do you have any facilities to deal with those people?

A Not that I know of.

Q So that could you put together a package for supervised release for somebody who is up in Ossining?

A Probably not, unless they were down here and we were able to see them here.

We have done that one one occasion that I know of where a Supreme Court Judge requests us to come over and we actually ended up not recommending the defendant, but we did put together a package at the request of the Judge, and he was released to that package.

Q But you don't have the facilities to do it regularly in Ossining?

A No.

Q Now, again, after the preliminary hearing, how many additional -- withdrawn.

After the arraignment stage, how many additional people are released on recognizance?

Q The over-all percentage, as I stated earlier, for release at arraignment is approximately 43 per cent.

On top of that, there is approximately 10 to 15 per cent per month that are generally released ROR at some later hearing. Maybe at the preliminary hearing or it may be down the line somewhere.

Q When a private attorney utilizes your services for the supervised release function, do you know whether that attorney is an 18-B attorney or he is retained?

A It doesn't enter into -- He may tell us, but

it doesn't enter into any type of decision at all in deciding whether to go with the person.

Q Do you have any information as to the frequenc that the 18-B attorneys use your services?

A No. Other othan -- I say no, I don't have any figures, but I know that the great majority of our cases come from Legal Aid.

I know the great majority of over-all cases are from Legal Aid, but we have much more response with Legal Aid than we do with private attorneys.

Q Now, the important or what has come through to me anyway, one of the important factors in your determination, is the person's roots in the community.

I would ask you if you -- what the effect, if any, you found to be of lengthy incarceration in putting together a package?

Say a defendant has been in jail for three or four months and -- five months, and the Judge recommends him to you and you go out and you check his community roots in trying to put together a package.

Has -- have you noticed any effect on his ability to maintain contact with the outside during that period of time?

A During the period of three or four months while he's in?

Q Yes.

A As far as our recommending a person, the fact that he's been in for the three or four months, and that he hasn't had ties for that period of time, will not have any effect on our entry into the supervised release, because the supervised release we take his connections prior to going in and try to build up the support from that.

Q Have you found any difference in the strength of his roots in the community if you pick a man up in the Criminal Court stage when he's only been in for a week or two as opposed to if you pick a man up much later on in his case?

A Well, the major difference would be employment. Because a person has employment initially and he goes in for any period of time, he's most likely going to lose his job and not go back, so I would say the biggest difference in ties is in employment.

(Continued on next page.)

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DIRECT EXAMINATION

BY MR. LATIMER: (Cont.)

Q What about in terms of his contact with his family and other people he might have out in the community?

A That is cut down some, but that won't effect basically our recommendation for supervised release.

Q But those ties are hindered during the course of --

MR. HOFFMAN: Your Honor, I object.

THE COURT: Sustained.

MR. LATIMER: I withdraw that.

THE COURT: All right, Mr. Hoffman.

CROSS-EXAMINATION

BY MR. HOFFMAN:

Q Mr. Ryken, is this program currently in effect in any other counties in New York City?

A It's operating in Staten Island and will be operating starting Dec. 1st in the Bronx.

Q Do you know whether a program of this type is operating in any of the other counties of New York State?

A Excuse me, I don't want to mislead the Court; as I'm sure everybody is aware, there is a ROR program it's in operation inthe other boroughs being run by the Office of Probation. The amount of services they offer are

considerably less than the services we offer.

Actually, this was to replace the Office of Probation work that we came in in Brooklyn and we will be going into the Bronx. As far as other places in the State of New York, there are several limited ones, but I am not familiar with them.

I just know from having had requests for information.

Q Would it be accurate to say that this program is an experimental program that was instituted in Kings Count?

A I think that it was experimental to the extent that the idea was to see if the goals could be reached. But on the basis of experience in the District of Columbia and in Philadelphia and other places, I think that everybody knew what the result was going to be and it wasn't experimental in that nature.

Q And was this program implemented with the cooperation of the judicial authorities in Kings County and the State of New York?

A Very much so.

Q And have the judicial authorities cooperated with you in taking steps to further the program or make facilities available to the program?

A Yes.

Q Have the judges tended to rely more on the information that you have supplied to them as the program has moved forward?

A It's hard to make an exact estimate. We have gotten a much larger number of defendants released, but we in turn have been able to verify a lot more information than was done before and the percentage of your acceptance -- of our recommendations accepted by the judges are slightly higher than that under the Office of Probation, but because we are able to get more information and recommend more there are a lot larger number being released.

Q Do you attempt to screen all indigent defendants in Kings County who appear in the Supreme Court, Criminal Court?

A We screen all people. Every person brought in through the booking process as distinguished from the appearance tickets we interview that starts out in the Criminal Court.

If somebody goes on a direct indictment to the Supreme Court then we don't have access to them.

Q Would it be correct to say that the judges have become more disposed to grant release on a defendant's own recognizance now that your program is in full operation

and the judges have had access to the information that you supply to them?

A I think it varies with the judges. Some of them have more and some of them haven't changed very much. The percentages are -- have been fairly consistent throughout the years . We started out with a high percentage which we thought might be attributed to the fact that we were now and it was -- and they were giving us all the breaks, but it stayed fairly much level.

We have had between 40 and 45 percent release rate for the entire year of operation. Supervised release, yes, supervised release the more contact you have with a judge, the more apt he is to release somebody. The first time you go in he doesn't know who you are and so on, but as you go in several times and you build your credibility, yes, you will be accepted more.

Q You were speaking before about the skip rate, the aggregate skip rate and the willful skip rate and you mentioned certain percentages of defendants in those catagories.

Would you tell the Court in numerical terms what the number of defendants we are talking about here is?

A May I refresh my recollection?

Q Yes, please.

A On the willful skip rate, and this is based on a study from October 29 through April 29 -- October 29, 1973 through April 28, 1974 there were 11,816 appearances scheduled and four percent of those appearances were not made.

That comes to about 500, I guess.

Q And which catagory is that?

A That is the overall willful rate. In the recommended and verified, there were 6642 scheduled appearances and a two percent appearance skip rate, so it's substantial numbers.

Q You testified before that there were certain crimes which you described as being of an aggravated nature, where it might be possible that you would not care to make a recommendation in that case?

Is that correct?

A No. What I said is that on supervised release cases we will not go into cases because of the staff requirements that we have. We wanted to try to be as effective as possible, and if we had a situation, for example, where somebody had taken a knife and cut up his three-year old daughter or something of that nature, even though we had a good feeling the person would show up for trial we know from the nature of the case that the chances are a judge is not

going to release him.

And so in that case, because we have limited resources, we try and go with a case that we think we have got a chance to get the person released. But on the initial ROR recommendation the nature of the crime we never go into. We have no idea other than we know what the charges are, but we know nothing of the fats of the case.

Q Does your agency receive any funds from the State of New York?

A All of our funding comes from the Law Enforcement Assistance Act, through the State Crime Control Board and through the Criminal Justice Coordinating Council of the City of New York.

It's totally Federal funds with matching funds being furnished through the CJCC program of other things that they have going.

We operate under a subcontract with the City of New York.

Q And is it the City of New YOrk that provides the equivalent of matching funds?

A That's correct.

Q Will the program continue to be supported by Federal funds or will it eventually be taken over by the State and City?

A It has to either be taken over by the State or City or die.

Q And how long has the program been funded for?

A We are now funded through May 31st of this coming year and starting in December we will have to start making arrangements for funding for the next year. We have been told by the Federal authorities that the City will have to show an intention to start picking up some of the costs for additional expansion and so on, and my guess would be that there is a possibility of getting one more year of some type of Federal assistance, which will be the third year of the funding, and probably not beyond that, and the City will have to show some commitment in the way of funds for this next year also.

MR. HOFFMAN: Nothing further.

MR. WEBER: No questions.

MR. LATIMER: One or two more things, your Honor.

REDIRECT EXAMINATION

BY MR. LATIMER:

Q Do you know prior to the operation of the pretrial services agency whether or not there was any other experiment involving either supervised release or ROR in the City?

A Yes, I believe that the Lawyers' Committee or something of that nature, had a program on it.

Q So that you are not the first program of that nature that has functioned?

A No.

Q Now, have your interviews or the people that you send to Court, have any problems -- have they had any problems in terms of production of the defendnat in court when you are ready to make a package, if you know?

A The only case that would happen would be in supervised release and generally I would state, no, although there are a lot of time wasted in waiting in court, particularly in the Criminal Court.

I don't have the figures as to the number of times the defendant has not been produced.

Q Now, would it be beneficial, both to the program and to the defendants, if you had more information and more verifiable information within the first 72 hours of arrest?

A More verified information is always valuable. The more information in itself has some value, but there is only so much that the Court has time and is able to digest of the thing, and I don't know that we would need a whole lot of more information, but being able to verify more would be helpful.

Q Based on the experience of the program to date, are there more people who are not released, who might be if the information was able to be verified?

MR. HOFFMAN: I object to that. That is speculative.

THE COURT: It's hypothetical, but I will hear it.

THE WITNESS: Yes, there is a higher release rate among verified defendants than there are among qualified, so the more verifications you have the more people released.

MR. LATIMER: No further questions.

THE COURT: Thank you, Mr. Ryken, you are excused.

(Witness excused.)

MR. ALTERMAN: We have Mr. Leo Johnson, if it please the Court; I think I have about 45 minutes with Mr. Johnson. If a recess is anticipated I would prefer to have it now or whatever the Court pleases.

THE COURT: We will take a short recess now and then continue until lunchtime.

(Recess taken.)

THE COURT: I am sure you will tell the truth but I think we should have you sworn.

V I N C E N T D A M I A N I, called as a witness, having been first duly sworn, testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Vincent, V-i-n-c-e-n-t, middle initial D, Damiani, D-a-m-i-a-n-i.

THE COURT: Well, I think you have been sworn in this case once before. Maybe I didn't need it today. But this is a separate hearing.

All right, Mr. Hoffman, you can go ahead.

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q Judge, what is your present position in the Kings County Supreme Court?

A My official title is Assistant Administrative Judge in charge of the criminal branch of the Supreme Court Kings County.

I also administer -- well, actually it is the Second Judicial District which is Kings County and Richmond.

I also administer the narcotics parts in Brooklyn, Queens and Staten Island which is the Second and Eleventh Judicial Districts.

Q And in very brief terms will you describe what your duties are as an administrative judge?

A Well, in charge of the -- well, the administrative work -- the clerks, interpreters, court reporters, calendars, assignments -- we recommend assignment of judges, pension, payrolls, all the housekeeping functions.

Q Now, Judge Damiani --

A I might say we have some six hundred employees. And thirt--seven criminal parts. Judge Cone, who administers the civil side, there are about thirty-six civil parts.

Q Judge, have you sat as an arraignment judge in the Kings County Supreme Court?

A Many times.

Q Will you describe to the Court the manner in which bail is set in the arraignment parts?

A Well, first I think we have to say something about what happens before the case gets to us. Most of the cases start in the lower court, that is all, except what they call office origin cases where the District Attorney's Office presents the case directly to the grand jury. But most cases start in the lower court. A defendant is either held for the grand jury or is waived to the grand jury. Then the case becomes our responsibility.

Bail is generally set in the lower court. It is reviewed there from time to time.

And after an indictment is filed an arraignment

calendar is prepared. The cases are called in the arraignment part. At that time a Supreme Court Judge has power to set bail de novo. Generally, unless there is some new or changed circumstance the tendency is for the judge to continue the bail below.

What else do you want to know?

Q What is the information that a Supreme Court Judge has before him in setting bail?

A Well, generally we have the lower court papers, the lower court complaint with all the endorsements on it which indicate what the bail was that was set; whether a hearing was held or not; whether the bail was changed or even fixed initially after a hearing. We have the defendant's criminal record in the form of either a yellow sheet or the NYSIIS sheet which is a machine record form which has his criminal record, a copy of the indictment. The arraignment of course -- at the arraignment the District Attorney has his file, and generally in his file he has a summary of the testimony before the grand jury which is available to us. Then of course the defendant's lawyer is there and he has his file, and both of them are here on the arraignment.

Q Have you had any problem in receiving information of the defendant's criminal record?

A Yes. Well, it has always been a problem. On the

yellow sheets the Police Department have the information. And in the old days it was simple. We had a court officer go across the bridge to police headquarters and we would get it. Then they put in the machine records system. For some reason unknown to me they never fed into the machine the information from the Police Department. There were other sources where they could have had the information. That would have been, for example, from our local probation department. Everybody who has had a probation report prepared in Kings County, his record was compiled, and they were very accurate. When they started they had a form called the JC500. And when they had no disposition as to an arrest record they sent those JC500's to the local counties where the conviction was had. And we began to get them by the thousands. But we did not have the help to complete them. And it got to the point where I can remember at one point we had 27,000. And we scrounged help to try to finish them. And it was only until this summer that we finally got college students and other help, and I am happy to say that I think by next month we will be current as far as Kings County is concerned.

Now, these JC500's give a complete record of what happened to -- well, first the JC500 is sent to the lower court to get their part of the story or the record. Then they go back to the machine records unit. Then they come to us and we

complete the Supreme Court part of it. And then we send them back to them. We also have been asking to get forms initially so we could start to compile these things as the case goes through the court. They are taking some of our suggestions. I think that that will be cleared up, at least in Kings County. I don't know what the situation is in the rest of the state.

Q So that you are almost up to date on defendants who are convicted and sentenced in Kings County.

A We are finished sending in the JC500's. Well, I only spoke to the judge in the arraignment part two weeks ago and he said there is about a fifty per cent improvement since the last time he sat which was eight or ten months before. There is an improvement. It is not -- we don't have all the convictions. I might say this, sitting in the arraignment part when we have a yellow sheet or a NYSIIS sheet, where there is a blank, the obvious thing to do and what is done is the defendant is asked what was the disposition in that case -- and I can speak only for myself but my experience has been that they were truthful. And the practice in the court was to put a question mark next to it to indicate that it was not verified but it came from the defendants or the defendants' attorneys or some other source. But generally the defendants were truthful because they knew ultimately it would probably be checked. And it was only in rare cases where I found later on that what the

defendant told me wasn't so. So I think that worked -- I don't think there was any prejudice in that sense. That was my own experience.

Q Now, after bail is set --

A Ultimately it did get checked in the trial part, or whatever.

Q After bail was set in the arraignment part what are the mechanisms by which bail is reviewed?

A Well, after the arraignment within ten days or two weeks, and the date is set at the arraignment, the case is called in one of our conference parts. We generally had two conference parts. We are down to one at the present time. At that time the defendant would be brought in. His attorney would be there and the D.A. would be there. And there would be a conference held with a view to disposition. Now, this is a more relaxed conference, more time is taken with the cases. And the case is reviewed. And while generally there was not much change in bail because it was only two weeks later, perhaps, and there wasn't any change in circumstance -- there weren't many changes in bail. But the judge there had the power to change it if he wanted to.

Now, after that conference if there is no plea taken, there is no disposition, the case is assigned immediately to a trial part. And I was instrumental in getting the Appellate

Division to amend our rules so that an oral application for bail review could be made at any time in the trial part. That is still the rule. If a defendant writes a letter from the jail to us that letter goes on the calendar in Part 1 and the defendant's attorney is notified. And the defendant is notified that the motion is on.

Q Are you speaking of bail now?

A I am talking about bail. If he complains about bail. Wedidn't do that at one time. But some of the defense lawyers and the Legal Aid Society criticized for holding these letters, not getting to them, or whatever, but they go on the calendar and they will be reviewed, and any requests for change in representation.

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Q Now, is there another part in the court where bail is set for review or where bail is specially reviewed?

A If the defendant is not happy with what the trial judge does on his application for bail we have a kind of buffer part so that the Appellate Division is not inundated with bail motions and where one of our senior judges, it has usually been Judge Barshay and myself, or Judge Starkey. In effect it is one Supreme Court Judge reviewing another, but nevertheless that is it. And if the defendant is not happy with what the Judge does in what we call Special 10 then he can go to the Appellate Division.

Q And are there any limits on the applications that the defendants can make to Special 10?

A No. But he won't get anywhere if there is no change in circumstance generally --

Q Now, Judge Damiani --

A I mean if he does it frequently.

Q Does there come a time during the year when the cases are reviewed by the court, particularly older cases?

A Well, when our case load was around four or five thousand, we had about twelve or fourteen parts, the case load in each part in some instances got up to three hundred cases, two hundred cases, and then I as administrator, and with suggestions from the District Attorney or the Legal

Aid Society and what-not, we took apart and recycled it -- that was the word we used -- we took these cases and ran them through the conference part again because they had been on the calendar and maybe had not been reached, where the defendant had not been in for some period of time, so we would take those parts where the judge was not known to be a plea bargainer or wasn't interested in taking pleas and wanted to try one case after the other, and we recycled a lot of these parts. And of course in these conference parts with the judges who were more liberal in the sense of plea negotiation. But we do not do that any more because we are down to a workable case load and now we have got thirty-seven parts and the case load runs anywhere from thirty to forty cases, and maybe a hundred, except in our rackets part.

(continued next page)

Q Was bail reviewed during the recycling?

A Yes, sure.

Q At the present time, has the court administrator's office required you to review any old cases?

A Well, in May and June, Judge Breitel asked that any prisoner who had been in jail eighteen months or more be brought in, and we did that.

In May and June we brought everyone in and we are also doing it now with the people in jail twelve months.

And the office of the court administration under Judge Bartlett has statistics on that review. We found that maybe seventy per cent of the people in jail eighteen months are involved in homicide or multiple-defendant cases. That is the way our statistics ran.

I have a report on what we did at that time if you are interested. We are now doing it with twelve months. What happens is this: We have a big red stamp that we call flagging the file. We put a red stamp on the file which indicates the defendant has been incarcerated for twelve months or more.

When that case is called, for any reason, what happens in that case is that the folder goes upstairs to the Clerk's office to a particular clerk who makes out a particular machine records form giving all the information in the case,

why the case was not disposed of, what the reason for the delay was. And that form is sent over every Friday, as many as there are, to the court administration. It is a machine records function, and Judge Breitel and Judge Bartlett are keeping close watch on those twelve month cases. That is what is going on at the present time.

In addition to that, I have sent -- each month I have sent a letter to each judge in each part listing those cases and I get a report from them at the end of the month as to what progress has been made. It worked very well so far with the eighteen-month cases.

We follow up with the correction department printout, adding the case that becomes a twelve-month case. That is where the defendant has been in jail twelve months.

Q I would like you to describe to the Court the holding pens and counsel conference areas you have at the Supreme Court.

A Well, just a little background: The Supreme Court building was designed as a civil court and was never intended as a criminal court building. We have a pen on the ninth floor. We require some two hundred prisoners and we were lucky to put in 135 or 150. At any rate, we have a very modern pen on the third floor. And on September 4th, ten parts moved over to 120 Schermerhorn Street under the narcotics

program. Those are narcotic cases, although not all the cases in the part are narcotics cases. There are ten parts. Three more will go over in January. That has loosened things up as far as pen space is concerned.

Before the narcotics parts moved over some of the rooms behind the courtrooms that could be used for pen space, which were robing rooms, were used. Judges didn't have chambers and they were doubling up in the robing room.

At the present time, the interviewing facilities on the third floor and the new pen added down there are quite adequate.

Q Will you describe what the facilities are?

A Three interviewing rooms with glass panels and a larger room that sometimes is used for psychiatric examinations and that sort of thing. We don't get any static or complaints about the third floor. I agree that the ninth floor is not satisfactory. There is one large room that used to be a robing room with a long table and chairs which is not adequate.

Now, we acquired some space, as I said, on September 3rd, and we are hoping to add another robing room and hopefully make interviewing booths or put up some panels that will give some more privacy to the lawyers interviewing clients. That has been a big headache with us.

Q Have you made any request to any city agency?

A Yes. Our chief clerk has been in touch with the Department of Public Works. I am sorry to say when you get a project that has to be done within the city, without a private contractor from the outside, it takes longer.

Q Are there any special problems as far as the prisoners are concerned in terms of certain categories of prisoners that have to be isolated?

A In addition to the regular pen, you had to have special facilities for the ladies. And sometimes for disturbed prisoners. Particularly violent or security risks, they require separate pens which we have.

Q What are the total number of parts in operation at the present time?

A Thirty-seven. When Judge Murtaugh comes over it is thirty-eight. We don't get any added staff for that. Mr. Nadjari got the money, we didn't.

Q Can you describe the breakdown in the thirty-seven?

A One arraignment part, one conference part, four murder parts. Because of the eighteen-month business and knowing that many of those are murder cases, in addition to trying murder cases in the four murder parts, from time to time we take twenty-five to fifty murder cases and spread them

out in the other parts. We have done that twice in the past five or six months.

We have two, what you call major offense bureau parts, federally funded. We have two rackets parts. We just started a second one this month -- or the calendars will be for October. That was a troublesome part because you have a large number of defendants. For example, our District Attorney indicted a lot of people -- a large number of people in this private carting business. Sixty-four defendants in seven indictments. And then the gold bug, the gambling round-up, with 220 indictments with over 400 defendants. So we started another racket part.

There are thirteen narcotics parts. Eleven of them are funded by the state funded by the Rockefeller program, so-called, and two of them had been federally funded. Now they are partially state and federally funded. There are thirteen of those.

Eleven parts where we group the Legal Aid cases so we save the Legal Aid lawyers from running all over the courthouse. Those Legal Aid parts are Legal Aid cases basically.

There are three bail parts where defendants are on bail.

Q What are the criteria by which cases are sent

to the narcotic part?

A It's got to be a narcotics charge.

Q Is it solely possession of narcotics or can it be a related offense?

A When these narcotic parts were created there was a plan the Legislature said had to be passed on, that plan provided that eighty per cent of the cases had to be originally under the narcotics law. The narcotics law has a provision if there is a prior felony there are much more serious punishments. So, Judge Ross and other city administrator judges have interpreted that that eighty per cent of the cases in the narcotics part must be narcotic cases or have a predicate felony because that is generated by the narcotics statute. Twenty per cent of the cases can be any type of criminal case. And the narcotics volume has decreased fortunately, and not anywhere near as many cases as people anticipated when the act was passed.

Q I would like to direct your attention to the subject of calendar control and ask you to explain the efforts in that direction.

A When Judge Breitel became Chief, his first priority was the court should take over the calendar where the District Attorney had control. We have done that. We did that over the summer. The District Attorney prepared the

calendars and that had certain disadvantages. We started to take it over and we have taken them over. We have a card on every case. We make up the calendars for the judges. Of course, the judge by granting adjournment creates his own calendar for the future from here out. And it isn't the District Attorney who puts them on. So the judge sets the order of trial.

Our rule and policy is of course the oldest jail case is to be tried first. And it is working pretty well. We still have some bugs in it. I put out two or three memoranda so far trying to educate the judges and the clerk in this new procedure.

Q I show you Defendant's Exhibits B and C.

Will you describe what these memoranda are?

A This is a memorandum I issued on July 25th on calendar control indicating effective July 29 the court would assume full control of the calendar. And it sets up some procedures.

And I issued another one on August 19th, which we found in two weeks that there were certain things the clerks and judges didn't understand about the new control and certain other things came up. There is going to be another one out Friday.

Q Will there be a meeting of the staff?

A Our court was divided during the summer. Half the judges sat. Everybody is back now. Everybody came back the day after Labor Day and we are having a meeting on Friday at which these memoranda and other things will be discussed.

MR. HOFFMAN: I offer them.

MR. ALTERMAN: No objection.

THE COURT: Let them be marked.

MR. HOFFMAN: We pre-marked them, your Honor.

THE COURT: Let me look at them.

THE CLERK: B and C marked in evidence.

(So marked.)

THE COURT: All right.

Q Will you explain what is meant in the memorandum by a daily calendar?

A When the District Attorney prepared the calendar the practice was he would make up a weekly calendar. All the cases were put down for Monday and there would be a reserve calendar where the judge could bring cases up. We found that -- at least I found it very unsatisfactory. A judge would start a case and put everything else over, and the defendant would take a plea and t. re would be a hiatus before he would start another trial.

We broke the calendar down to Monday, Tuesday, Wednesday, and Thursday, leaving Friday open. That would be for adjournments and things. I think this will work much

better. We will also have shorter calendars.

We have also instituted with the Correction Department what we call a 299. This is a card that goes with the prisoner. The card goes with the body, we say. We don't carry cases ready and past, ready subject. The system is similar to the lower courts. Every case has a specific date. On every two 299 there is a specific date. And the case is adjourned to a particular date. And the defendant's lawyer gets oral notification just as you do in civil cases .

Q Is there also a policy with respect to sentencing?

A On sentencing, a date of five weeks is fixed. I am happy to say we are current in Kings County, in the Supreme Court. We have been sentencing on the fifth week unless there is a psychiatric examination or some exception. Our statistics show it was pretty bad three or four years ago.

(continued next page)

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Q Has the Court tried to maintain a limitation of the cases assigned to the Legal Aid Society?

A Judge Judd set a limit of 30. We have continued to respect that.

THE COURT: I was reversed by the Court of Appeals, so you are doing that out of good will.

THE WITNESS: That was on a technicality. But it was 30. We don't seem to have any problem with that. Sometimes you get a Legal Aid assistant with 30 cases, and he doesn't plea bargain any and then he is not ready.

THE COURT: Is the Legal Aid Society back at work?

THE WITNESS: Are they?

THE COURT: Are they?

THE WITNESS: No.

THE COURT: That is irrelevant here, I guess.

THE WITNESS: They are still on strike.

Q Judge, do you have statistics on the number of defendants incarcerated in Kings County?

A I get a printout from the Department of Correction every month which indicates what the number of prisoners that are charged to us is. It is slowly improving. As of February 28 --

Q 1974?

A 1974, the Department printout indicated there were 327 in jail for more than nine months, and five hundred and forty seven, more than six months.

The figure was higher on the roster, but we deducted from the figure those defendants awaiting sentence.

In other words, they had been convicted. They weren't awaiting trial.

Now, after we took that figure out, this doens't necessarily mean these people are all awaiting trial. They may be down on a coram nobis or they may be down -- serving a Federal sentence or state sentence, and down on some other case. But taking out the convictions, February 28, 327 of nine months or more; 547, six months or more.

And the figure as of July 31 --

Q 1974?

A 1974. 223, more than nine months, and 347 more than six months.

And again, they are not all awaiting trial.

THE COURT: How does it happen to be some are in the six month category, if it is just awaiting coram nobis?

THE WITNESS: When they set up a roster, they put on the people that are incarcerated for six months. He may be incarcerated on a sentence that he is serving,

and this is a newer case, or he may be down on a coram nobis on that case. Or you get situations that somebody is comin- back from Matawan, who has been there for two years. The date they show is the date of the original arrest.

MR. HOFFMAN: That's all.

THE COURT: Mr. Weber, do you want to examine?

MR. WEBER: No.

THE COURT: Alterman?

CROSS EXAMINATION

BY MR. ALTERMAN:

Q Justice Damiani, you are familiar with the statistics released by the management planning unit of the judicial conference, aren't you?

A That is a long report that comes out once a month? Yes.

Q Your office received that report once a month?

A Yes. I think I have it here for July.

Q I would like to show you --

A Go ahead.

Q Okay. --the report of Management Planning Unit as of May 3. I would like you to tell the Court how many active pending felony defendants there were in Kings County.

A 2995 according to the report.

Q I would like you to tell the Court if there was a plus or minus for that month?

A Plus 199 for the month, according to the report.

Q What does that 199 figure signify?

A An increase in case load.

Q I would like to show you the report of the Management Planning Unit data, and I would like you to tell the Court what the active pending defendants are, as of May 31, 1974?

A 3,654.

Q I would like you to tell the Court how is that reflected in the statistics --

A This shows 759. Just --

Q Wait --

THE COURT: Let the Judge answer.

A I am going to tell you, I don't know, and I have never been able to know how they adjust that figure. Ask them.

Q Does that figure, that 759 figure represent an increase in the pending cases?

A According to their report, it does. I can show you our weekly report and the District Attorney's report, and there is no such increase.

Q Was that figure as the result of an audit by the District Attorney's office?

A A what?

Q An audit.

A I have no idea how they adjusted that figure or why.

Q Do you know where the figure --

A I can tell you there are about 3300 cases pending.

Q Do you know where the management planning unit gets its figures to base its statistics on?

A The report says.

Q I am asking you a question.

A Yes.

Q Where?

A There is a JC -- it is stated there. I don't remember the number. There is a form that is sent in by each clerk's office.

JC 153.

Q Is that from your office?

A Yes.

Q Is it your testimony then, your office prepared the statistics that the management planning unit data statistic are based upon?

A They may get them from there and other places.

Q Isn't it a fact, they get them from the District Attorney's office?

A That is true, also from the District Attorney's office.

Q Would you say, Justice Demiani, that is difficult for such a large amount of variation in the cases, so that the

A My own opinion is they have got over 500 cases -- not actually pending --

Q Can you explain that?

A I wish I could, I can't. I can only explain my figures, not theirs.

Q Would you know when the last previous audit of those --

A I don't know what you mean by previous audit. Nobody ever audited. The last time I was here, we both, the District Attorney and my office, had made a file by file account.

Q I am asking you to please read from plaintiff's exhibit number 17.

A I am not responsible for that report. I know what it says and it is there. I just don't agree with it.

Q Is it your testimony that the District Attorney's figures are accurate?

A I would say that the District Attorney's are more accurate than this report.

Q But you don't know what figures --

A I don't know where they get 3805, for example, at the end of the July term. I say that it is 3300.

Q Do you know if the District Attorney gets his figures from the Department of Correction?

A I don't know if he gets his figures from the Department--

Q Justice Damiani --

A I will tell you this, we all get a report from the Department of Corrections, which looks like this (indicating) every week. It is for every County and it is broken down by adult and young adult.

Q Has it been your experience to find the Department of Corrections statistics to be accurate?

A This report, yes. Their printout, no. This is a head count. But I wouldn't trust their machine records printout--

Q Justice Damiani, you testified that as of January 31, 1971, there was approximately 5 -- excuse me, withdrawn.

You testified that as February 28, 1974, there was approximately 547 defendants who were incarcerated in the matters pending in the Kings County Supreme Court for six months?

A Right.

Q Would you say that figure on February 28, represented a decrease from the previous two months or increase? The 547 figure, does that -- would you say that represents an increased amount of defendants of more than six months or decrease for the two months?

A What figures are you comparing?

THE COURT: 12/31/73.

Q Yes.

A 12/31/73 --

Q At the end of the year, between January 1 and February 28, would you say that the amount of the defendants who were pending more than six months increased or decreased?

THE WITNESS: Can you read that back?

(Whereupon, the last question was read by the Reporter).

A I have those figures. December 31, '73, it was 572 according to my figures, and the end of February, it was 547.

Q The answer --

A Decreased and continued to decrease.

Q Justice Damiani, I am reading from the office of the District Attorney's memorandum dated March 7, 1974, submitted to the Court, for its attention after it issued its injunction, as to speedy trials, March, '74.

I would like to read from page two of the memorandum.

THE COURT: Is that an exhibit in the case?

MR. ALTERMAN: Yes. It has already been received, your Honor.

I would like to read:

"An analysis of the Department of Correction's computer printout of the defendants in jail by commitment date, indicates that as of January

6th, 1974, there were 398 defendants awaiting trial for over six months in Kings County."

Based on your previous testimony, would you care to comment on that statement by the District Attorney?

A I tried to point that out. I said the figures that I have here are the number on the printout, less the convictions. The number I gave is not awaiting trial. The number I gave, the figure is higher than those awaiting trial. What the District Attorney didn't prepare, is a trial by trial check.

Is this the memorandum submitted by the District Attorney at the time you rendered your decision last time?

THE COURT: I think so.

THE WITNESS: This made a file by file check, and that's why I said earlier, I would not rely on the Department of Corrections printouts except, they say, at that time, he had that number of bodies, that number of people.

And you have to see the reason why each one of them was held. As I say, it was fairly easy for me to find who was there awaiting sentence. I deducted that. There are a lot of categories.

Before the District Attorney submitted that figure to Judge Judd, they looked at their file. The figures they gave are people who are awaiting trial.

(Continued on next page.)

Q Do you have any personal knowledge of that statement that he looked at their files in computing the number of people over six months?

A All I know is what was testified to here last time and in discussing with them in preparation for trial, and that's what they told me.

Q Judge Damiani, how can you make that statement when the first sentence reads: "An analysis of the Department of Correction computer printouts of defendants in jail by commitment date indicates that as of January 6, 1974, there were 398 defendants awaiting trial."

A They started with the printout and then they analyzed them against their files. After they analyzed that figure -- anybody who has dealt with these printouts knows that all the names on that printout are not people awaiting trial.

Q How many coram nobises would you say went into the count?

A I haven't any idea.

Q Well, the difference between 398 and 547 is approximately 149. Would you say that there was 149 men who had been detained for over six months that had either coram nobis or were down on others?

A There could be a great variety of reasons, and

my experience with the District Attorney is when they say that -- well, that they did it against their files, I accept that.

Q But you have no personal knowledge how they reached their computation?

A No. But what I am trying --

Q Thank you.

A Just a minute.

What I am trying to say is, and all I have done was I have taken their printouts, deducted the convictions and the figure goes down. Whether the figure is accurate or not, there is a decrease. That's the point. That's what's important to us in administration, with case loads, people in jail , probation reports, what's the trend, whether it is going up or is it going down.

Q Well, is it your testimony then that there is a trend in a reduction in the actual number of pending defendants?

A Right now fortunately there is a trend downward in every area.

Q How do you explain --

A As to indictments, as to case load, probation reports, people awaiting sentence.

Q How do you explain that 759-case discrepancy that appeared in the May 31 printout?

A I can explain why it went up a few months. Several of them were these rackets round-ups.

Q Well, isn't it a fact that you testified that as of the May 3rd printout the number of pending cases went up 199?

A If you want some figures that are reliable, that I can attest to, '72 to '73 we -- there were 9,077 defendants indicted in Kings County. '73 to '74 the figure is 6,720.

Q Judge Damiani, I am asking you regarding --

A That's as of the fiscal year, as of July --

Q With all due respect, I am asking you to try and talk about the number of pending cases. I am not asking you to testify about anything to do with reduction in indictment levels. That's not a province within the court.

THE COURT: What's your question?

Q My question is, what do you base your statement on that there has been a reduction in the trend of getting at the backlog in the last six months?

A The District Attorney puts out this weekly report which I have been following for years. Now that we have taken over the calendars we will take over this report, and as of September 6th the District Attorney indicated a case load of 3,351 cases, and I don't have any more accurate figure than that.

I expect that we will -- and we have worked with these reports in the sense that when we have to transfer cases, I know that approximately -- there are approximately that number of cases in each part as indicated by this report. This gives the number of indictments and the number of defendants and the dispositions each week, and I follow that very carefully.

Now, we will take over this report, I hope, in the next couple of months because it will be easier for us to do it, having the calendars.

Q Is it your testimony then that the trend in the actual number of pending defendants over six months has been decreasing?

A Yes.

Q Judge Damiani, I read to you from an exhibit that's been entered into evidence, of a memorandum from Judge Bartlett to Judge Breitel dated April 12, 1974. I am reading from page 4 and the memorandum deals with some statistics that were presented regarding the amount of -- the number of defendants who are in jail over six months entitled, "Issue 3." It says, "While the statistics presented above do give us a better idea of the extent of the problem, they certainly do not tell us why these defendants are still in jail after such a long period of time."

Would you say that statement is accurate?

A That doesn't only refer to Kings County, does it?

Q No. Would you say statement is accurate for Kings County, that you really don't know why so many defendants are in jail for such a long time?

A Sure, I do know why. It was a question of priority in funds, which fortunately the Legislature is beginning to see the light. When we had 5,000 cases in fourteen parts -- now we have a much better situation with maybe 3,500 cases and thirty-seven parts. We have a workable case load in each part which we never had before.

We still have problems because the money in these parts came so late that we -- the District Attorneys and the Legal Aid lawyers are not as experienced and, I dare say, even some of the judges who have recently been appointed are not as experienced as they will be.

Q Is it true that the thirteen narcotics parts --

A Just to give you an idea of course, on these new narcotics parts that were opened, the staffing pattern for personnel is $333,000 a year per part. $2.5 million was spent over at 120 Schermerhorn St. It took $900,000 of that to make a pen on the ninth floor to serve the criminal court in that building, and these pen and what will be thirteen narcotics parts. It's a very expensive business and it took

a long time to get the Legislature and the powers that be to put the money where it should have been.

Q Would you admit, then, that there is still a problem with the backlog in Kings County?

A There will be a problem when we have defendants waiting more than one day for a trial.

Q Okay.

You testified last July that more money, more courtrooms, more judges, more administrative personnel were needed.

A Right.

Q You have also testified that you have gotten additional help.

A We certainly have. We now have -- we have over 600 employees and the District Attorney has 247 Assistant D.A.'s now.

Q Are there any other future plans or suggestions--

A Legal Aid has -- I know they have got at least 75 lawyers in our building.

Q Are there any other suggestions or future plans that you intend to push either on the legislative level or at the city level to alleviate some of the congestion that you have testified to?

A Let's get the perspective of the judge, and this

has been a bone of contention.

We do not appropriate money. We do not make plans. We do not run prisons. There are alot of things we don't do. What we do is sit on a bench and we are arbitrators; we are referees; we are umpires; we try cases.

They have changed the administration to put -- to have administrative judges. But we still don't control the purse strings. When we say "remanded," we have nothing to say as to where a defendant goes, whether he goes up to Sing Sing or whether he stays in Brooklyn House or whether he goes to Rikers Island.

Q Your major concern, sir, is it a fair statement to say --

A Is to do the best with what we got.

Q In protecting the individual rights of all defendants?

A Of course. I mean, you know, defense lawyers don't have a monopoly on protecting defendants' rights. We are against sin, too.

Q Judge Damiani --

THE COURT: That's why I have cases not only against the Supreme Court but against the Department of Correction, too.

Q Judge Damiani, how many trials took place in

Kings County Supreme Court for the last month that you have information for?

A What?

Q How many trials took place in Kings County Supreme Court for the last month that you have information for, if you have?

Do you have any information for any of the number of trials?

A I can give you what it was for the year '73-74, July to July.

Q Through July '74?

A Yes. That's pretty good.

Q Fine. What are you reading from, by the way, sir?

A A report prepared by our one statistician.

Q In your office?

A Yes.

Q So you have personal knowledge how this report was prepared?

A Yes.

Q Good.

How was it prepared?

A By daily disposition sheets from the trial parts.

Q Where do you get those disposition sheets?

A Then consolidated every week and then consolidated for the year.

Now, what is it you want to know?

Q I want to know, No. 1, where you get those disposition sheets?

THE COURT: You first asked him the number of trials in '73-74. Let's get that. Then you can cross-examine about that, if you want.

Q All right, thank you.

A There were 809 trials commenced. There were 64 disagreements.

Q What does "disagreements" mean?

A Mistrials, one form of mistrial.

Sixty-four disagreements, 84 other types of mistrial. Five hundred seventy cases were tried, proof completed. 687 defendants were tried with proof completed.

Q Is that figure that you gave me -- does that represent an increase from last July or a decrease?

A I don't have the figure for the year before. I don't think we kept that -- or at least I don't have the statistics.

Q Without the statistics, based on your observation as the administrative judge.

A I would tell you generally that jury trials are

increasing to almost ten per cent, which is high, and -- well, that's it. I think that's true throughout the city.

Q You testified that you had tried to get certain cases recycled, if that's the word you used, from in front of plea bargaining judges in terms of a conference.

A Right.

Q Could your court function --

A Let me just interject this, if I may.

When I testified on direct, I failed to point out that every June and every December, for as long as I have been associated with the administration, which is about ten years, we have brought in every jail defendant just before the summer and also just before Christmas, before the Christmas holidays for a bail review and with a view to disposition.

Q This has happened almost every summer?

A Yes.

Q Are you sure about that?

A We may have skipped one year when we did a lot of recycling. But I can show you memoranda for the last two or three years where it was done.

Q Justice Damiani, you testified last summer, when I asked you the same question, there were no official plans for having crash conferencing, so to speak.

A What?

Q You testified last summer, and when I asked you a similar question as to whether or not there were any plans for crash conferencing of cases where the defendants were --

A We didn't have one last summer because we had just recycled a lot of those parts.

Q Did you have one last June?

A We just had one in May and June on the eighteen months.

Q Justice Damiani, you just testified that since you have been there, there has been a crash conferencing in summers and winters for the last ten years.

A Generally, yes.

Q "Generally yes" now.

I have asked you, last summer you testified that there was no crash conferencing. Was there a crash conferencing last December, 1973, and if so, would you kindly describe it.

A Well, I don't know if I have the '73. Here are the memoranda for '72.

Q So is it your testimony, Judge, that you are not sure if there was a crash conferencing scheduled for '73 in December?

A It was generally our policy to bring everybody

in in June and December. Now, we may have skipped one here or there because we had done a lot of recycling and we figured that it was quite a task to bring in every defendant. It was quite a burden to the Correction Department and that was generally our policy. Now, we may have skipped a December or a June here and there. I would have to go back.

Q You are not really sure?

A No, I am not sure. But that was generally the policy, and I think we did it more times than we didn't.

Q Was that policy contained in any administrative directives from either your office or the Appellate Division?

A Yes. I have got some here.

Q Can I see them?

A Yes (handing).

Is that on bail review?

Q Yes. This is bail review.

MR. ALTERMAN: I will withdraw that question.

A I can get the directives if I have to. But that was generally the policy and there is notmuch doubt about it.

Q Judge Damiani, you testified that you tried to get cases recycled from in front of judges who were more susceptible to plea bargaining to get those cases out of your pending parts.

A Yes.

Q Could your court function adequately if thirty per cent of the defendants instead of ten per cent wanted a trial on their cases?

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MR. WEBER: I object to that. It's very speculative.

THE COURT: I will sustain the objection. I think it's a hypothetical case. We can add and figure out what would happen if they had twice as many trials.

Q Is your Court equipped to deal with twice as many trials for next year, in your official position as administrative Judge of Kings County?

A I don't know how to answer that. Arewe equipped? We have got a lot better equipment this year than we had last year, several over at 120 Schermerhorn Street. But I can't -- I don't know what you mean. Are we bettgr equipped? The Judges will have more experience, Legal Aid will have more experience, the DA's will have more experience. Maybe our taking over the calendar will help. Maybe the new system of calendaring and bringing in the defendants will help.

Q I asked that question for a specific reason, because if the number of trials, in your opinion, have increased significantly since last July, will this ultimately decrease the backlog, or cause it to build up again, because people will not plead out?

A It will in certain types of cases. For instance, one reason for the additional trials, is the narcotics law, which

has life sentences, but more important is the predicate felony provision.

Anyone who has had a felony, and he is indicated for a felony, nobody can reduce that, and the only plea he can take wouldbe a felony, and the least he can get is one to three. That's the thing that's created the trials, and the increase in trials, and will continue to do so.

Q In your report that you testified about regarding the number of trials, could you please break down how many of those cases that were tried, were convicted and what number were acquitted?

A Well, I can tell you this. In '73-'74, we had 206 acquittals. We had 319 convictions for felony after trial, or by trial, and then we had miscellaneous 95, for example, abated, where a defendant died and other situations.

Q Do you have any statistics on whether or not of those 600 or so trials that you say were held, the number of defendants who were in jail at the time of their trial, the number of defendants out on bail or paroled?

A No, I can't tell you that.

Q You testified that there are presently 37 trial parts in Kings County, and that's broken down into narcotics parts, MOB parts, Legal Aid Parts, and bail parts.

THE COURT: Major Offense Bureau.

Q Wouldn't you say it's true that the variations in the case loads in those individual parts are enormous in terms of one part might have a 30 case load, another part might have 100?

A No. The rules require -- and I think Judge Vetrano, who has done most of the assigning, has tried to equalize the parts whereever possible.

Q Isn't it a fact, Judge Damiani, that some of those trial parts have 1972 cases, others have 1973 cases, still others might have '74 cases?

A It's entirely possible. But there would be no purpose in it. The parts are Part 23 and 24, and if my figures, as of September 6, or the DA's figures of September 6 are correct, they indicate that there were 120 indictments before Judge Hillerbrand in 23 and 107 before Judge Cowan in 24.

Q What type of parts are Part 23 and 24?

A They are the MOB parts.

Q Isn't it a fact that those parts are funded differently and treated differently in the administration of your Court?

A They are funded differently, in that it's Federal money and the grant indicates the type ofcase which is to be assigned to that part. They are basically aimed at violent street crimes, and the grant has a pattern or a formula or guidelines, if you will, which indicate what type of a case is to be

considered a MOB case.

Q Would you say then that Part 23 and 24 are typical of the other parts in the Kings County Supreme Court?

A No, definitely not.

Q Would you give us some figures or statistics regarding the case loads in some parts that you consider typical perhaps a Legal Aid part?

A What do you mean? All I can tell you is this, that those cases are generally defendants with two, three or four sheets, who committed a violent, or are charged with a violent crime.

Q Judge Damiani, maybe I am not making myself clear.

THE COURT: That's the MOP part that you are talking about?

THE WITNESS: Yes.

THE COURT: Mr. Alterman now asked you to give him a couple of typical Legal Aid parts to compare the case load.

THE WITNESS: I can tell you.

Our Legal Aid parts go from 6 to 16, and the figures vary from 101 to 148, 109, 101, 155, 103, 123, 119, 117, 105. That's the way they run.

Q Would you give us some comparative figures for the four murder parts?

A Are you trying to make the point that we tried to keep less cases in the MOB part?

Q I am trying to make the point that the MOB part is not typical --

A Because I think I can help you with that.

THE COURT: I am not sure what you are aiming at with respect to the issues I have to decide.

Q Would you care to give us --

A Let me just contribute this. I think this is what may be bothering you.

Part of the plan for these MOB parts, or one of the objectives of the plan was to see what the result would be if you would take a violent street crime by a person with a long record, and try him immediately or try him quickly, rather than the plea bargaining, and delaying the case.

So when we started the part we did keep it down for approximately -- we started with 50 cases, or something like that. We started it low.

Now it has built up.

Q You anticipate --

A Is that what you are after?

Q Yes.

For purposes of clarification, sir, I would like to restrict all questions to either Legal Aid Parts, murder Parts and not to the MOB parts.

I am not interested in any more testimony regarding the MOB part, as the Court, I think, has admonished me.

You have just given me some figures regarding the case load in the individual Legal Aid Parts.

Would you care to give me the same type of figures for the four murder parts, the pending cases, in the four murder parts?

A The murder parts are indictments in one -- in part two. We just added a murder part last month, an additional murder part, and that has 27 indictments. The third murder part has 64 and the fourth murder part has 62.

Q You testified --

A And we spread out 25 to 50 among the other parts.

Q What parts did you spread them out to?

A We generally put them into Legal Aid parts.

Q But isn't it a fact, that Legal Aid attorneys cannot try murder cases?

A That's right. That's one reason why we do it, so that when Legal Aid lawyers aren't ready, there is a murder case or something else that could go on, and further than that -- well, there is also a problem with capability -- well, I won't go into that. Murder cases, you usually like to get more senior Judgestrying them, than any brand-new Judge.

Q Are there any other current mechanisms to

investigate and monitor case progress with respect to murders?

A What?

Q Judge Damiani, is the greatest congestion in your Court, in the murder parts?

A I don't know what you mean by "congestion." The people are detained longer in murder cases.

Q How long would it take to get a case tried in a murder part for a murder defendant in terms from the date of an arrest?

A I couldn't possibly answer that.

Q Isn't it a fact, that the last time you did an audit, you discovered 124 cases in Kings County, where the defendants had been detained over 18 months?

A Seventy percent of our 18 month cases were murder cases, right.

Q So is it fair to say that your congestion is mostly in the murder parts?

A I don't know what you mean by "congestion."

Q The backlog.

A Just a minute.

The nature of the case is that the defense lawyer is trying to make every motion possible, trying to make as thorough an investigation as possible.

Most of the delays come from the defendant in that type of case. They are not going anywhere, because bail is generally high or no bail at all, particularly in felony murders.

The cases are conferenced as regularly and maybe more frequently than the average case, particularly where there is a family situation, crimes of passion, that sort of thing.

THE COURT: A larger proportion of those go to trial than other cases?

THE WITNESS: Oh, yes. That's the same with the narcotics cases.

THE COURT: I see you have your load in the murder parts somewhat lower than in the other parts.

THE WITNESS: We have accomplished that by opening four murder parts. Then those cases take a lot longer. That's the problem.

If you have one part -- well, take the Myrtle Avenue shootout. That took weeks.

Q Well, are there any other current mechanisms other than the ones you have testified to?

A I don't know what else we could do to move the murder cases any faster. I think, as a matter of fact, that I am prejudicing some of the other defendants at this point, where

we have four murder parts, and we are still spreading out murder cases among the other parts. Those that we spread out are not necessarily the felony murder cases.

They may have also a manslaughter element to them.

Q Isn't it a fact that over 200 cases involving homicides are still inyour courts, where the defendant has been in jail for over six months?

A What?

Q At least two hundred of the cases in the murder parts, are cases where the defendant has been in jail for over six months?

A There are very little more than 200 cases, I think, of murder cases.

Q How many murder cases do you have pending?

A About 225, something like that.

Q Do you have any breakdown on how many of those defendants are over six months?

A I said seventy percent were over eighteen months.

How many over six months? I don't know. But I would say generally, a defendant in a murder case is not tried before six months, and doesn't want to be.

THE COURT: What am I going to be asked to decide after this is in, with respect to these statistics, Mr. Alterman?

MR. ALTERMAN: Well, your Honor, we take the position that those indictees in Kings County that are accused of murder, have a right to a speedy trial.

Number two, if the facilities in Kings County are not adequate to give them a speedy trial, then some mechanism should be developed with respect to their bail, so that they could at least, minimize the prejudice that flows from extended periods of long incarceration.

That's precisely what we are trying to explore here.

I will move on to something else.

THE WITNESS: We got an average of less than 60 cases in the murder part.

Q Would you say that the District Attorney's police notto recommend a plea bargaining in felony murder cases, contributes to the delay?

MR. HOFFMAN: I object.

THE COURT: First, is there such a policy?

I am not sure whether I heard that testimony.

Q Is there a policy?

A Well, generally, the District Attorney -- well, I will say this. I don't know whether in every case, but in many felony murder cases, he wants a plea to the indictment.

Q Are there any plans to create more murder parts in Kings County, as of this time?

A No, sir. I think -- having less than sixty cases in a part, is pretty good.

Q Who are indigents accused of capital crimes, represented by in King County?

A 18B lawyer.

Q Are they picked from a special 18B murder panel?

A They are picked from a special panel, and it's not necessary to take them in order. The Judge in part one who makes the assignment in a murder case, takes them from this panel.

Q Do you have any idea how many attorneys are on that panel, who do 18B murder work in Brooklyn?

A I will take a guess, around maybe 50.

Q Do you think it would be helpful to recruit more 18B attorneys to the panel, to have more cases tried? Would that reduce the backlog in the murder parts?

A If we had more 18B lawyers, would that slow things up, is that what you want?

Q Would that help things, by trying more cases.

A No, not particularly. Because of the limitation of the case load, we have developed a pretty good -- fair 18B Bar in Kings County, and even with this strike, we haven't

had that much trouble.

There has been a decrease in production, because in making the substitution, there has to be an adjournment, but we can handle the situation, even with the strike.

Q Even with the strike?

A Yes.

(Continued on next page.)

Q I am not asking you about the strike, your Honor, I am asking you as to --

A What I am trying to say is we have an adequate 18B bar, I think.

We don't just put 18B lawyers in. If there is a conflict of interest, we assign them.

Q As administrative judge are you in favor of permitting Legal Aid to handle murder cases? Would you be?

A I would have no objection to it.

Q Have you suggested this as a way of possibly looking at reducing the backlog?

A No.

Q Judge Damiani, in May of 1973, as you have testified to previously, this Court issued an injunction against the case loads of the Legal Aid Society and, as you testified, from May through the end of August 1973 18B attorneys took all new Supreme Court assignments. Would it be fair to say that 18B attorneys now handle more cases than they did when this suit was instituted in 1972?

A I have no idea.

The Legal Aid has been taking care of it. 18B lawyers are generally used where there is a conflict of interest or some special problem, where 18B -- where Legal Aid cannot represent the defendant.

Q What I am getting at is, if 18B attorneys represent indigents accused of murder and those cases of multiple crimes or where there is potential conflicts, which are serious crimes, which you have testified that seventy per cent of all those over eighteen months are murder cases, is the case load of the 18B panel weighted more heavily with jail cases than that of Legal Aid?

A You have lost me. I can't follow that kind of a question. I am sorry.

Q Because 18B attorneys represent murder cases and other serious crimes, is the case load of those 18B --

A It isn't every 18B lawyer who can be assigned to a murder case. You know that. That's a special panel.

Q I understand that.

I am asking a general question. Are the lawyers from the 18B panel weighted more heavily with jail cases than that of the Legal Aid Society because they handle more serious crimes?

A 18B lawyers don't handle any more serious crimes than the Legal Aid Society. The only place they come in where the Legal Aid does not is in murder cases and that's a special panel of 18B lawyers.

Q You testified on direct examination that the Legal Aid Society counsel individually are down to a case load

of thirty. On what do you base that?

A Statements from Mr. Caesar Serigliano, who is head of Legal Aid.

Q Do you know what percentage of pending cases are now represented by 18B counsel; do you have that statistic?

A No.

Q Do you know what percentage are represented by Legal Aid?

A You can get that from Mr. Spinakos, who is the Director of the panel.

Q Have there been any changes in the policy concerning the mode of assignment of the 18B attorneys that would reflect an increase in 18B participation, representation? Have any official policies come out of your office?

A No. There is a book of rules as to 18B which is issued by the Appellate Division and they set up the procedures, the compensation and all the rest of it. It's a printed pamphlet.

Q When you were sitting as an active trial judge, frequently 18B attorneys came before you; is that correct?

A Yes.

Q This question is directed to you both as in your official capacity as a judge and as a trial judge.

Have you received complaints from defendants

about 18B representation?

A Sometimes, yes.

Q Would you say frequently?

A I don't know what you mean by "frequently."

I can't generalize about 18B lawyers. Some are very good and some aren't.

Q On those complaints that you received, have you taken any action on them?

A I have never myself relieved an 18B lawyer or disciplined one. I have known of other judges who have.

Q Have you participated in any discussions with Mr. Spinakos and/or Mr. Gullotta, who is the presiding judge of the Appellate Division, regarding those complaints or generally 18B practice in the Supreme Court?

A No. They are under the supervision of the Appellate Division. They would get any complaints.

Q Well, Justice Brownstein testified here in late July, Judge, that he had received many prisoner complaints of 18B representation. These include lack of visits, lack of communication, failure to request investigators, failure to inform the court of non-appearances.

Have you heard similar complaints when you were sitting as an active trial judge?

A Yes. But I don't think the complaints against

the 18B lawyers are any greater than you get, say, against a Legal Aid lawyer.

Q Would yousay that their representation is about equal, the quality?

A I don't like to generalize. I think, if I were to make a generality, I would say maybe Legal Aid representation is better.

Q Have you ever spoken face to face with a prisoner or a defendant who complained about 18B representation?

A Yes. Also against a Legal Aid lawyer and also private lawyers.

Q Generally, what was your practice, what did you do after you received such a complaint?

A If he wasn't happy with the 18B lawyer and if there was a reason for his wanting the Legal Aid lawyer or the 18B lawyer or private counsel relieved, I would relieve him. But I just didn't relieve lawyers when a defendant -- just when I have the idea that he was just delaying things.

Q Generally, do you think prisoners who make complaints about their lawyers were delaying things?

A We do have such situations, no question about it.

Q Would you say that happens in the majority of the times?

A No.

Q Judge Damiani, you testified regarding your dissatisfaction with the interviewing conditions on the ninth floor of the Supreme Court; is that correct?

A Yes.

Q You also testified that you are in favor of plans to make them more adequate in terms of privacy, in terms of consultation with lawyers and clients and also the number of lawyers and clients who can be in there at the same time.

A Yes.

Q Could you tell us if any of these plans have been written down in directives or memoranda that you submitted to the City?

A Not yet. Wejust completed the move on September 4th.

Q Do you have any idea when such a plan would be submitted? I think it's pertinent to this.

A No, sir. It took us several years -- probably seven, eight or nine years to get the pen on the third floor.

Q How many defendants and their lawyers can confe in that ninth floor pen at any one given time, would you say?

A I would say seven or eight.

Q Seven lawyers --

A Or eight at a time.

Q Seven lawyers and seven defendants?

A It's not the happiest arrangement. There is one long counsel table maybe longer than that counsel table.

Q I see --

A There may be a table and perhaps another smaller table. You can have seven or eight interviews, I think.

Q How many courtrooms does the ninth floor service?

A Well, there are about seven on the ninth floor.

I think it services the ninth and the seventh basically and the third floor serves the rest.

Eight courtrooms on the ninth floor and about the same on the seventh.

Q Are the facilities there adequate to hold the number of defendants to be produced?

A I said --

Q To hold.

A The pens are adequate, yes.

The interviewing facilities are not, at the present time.

Q Are you familiar with the interviewing facilities at the Brooklyn House of Detention where defendants are arraigned in the Supreme Court?

A We have stopped that.

Q That's not going to happen any more?

A We are trying to see if we can do without it now that we have more space. We started that because of the bad jail conditions at the Supreme Court or the limited jail space. So the Mountain went to Mohammed.

THE COURT: You still have to have interviews between lawyers and defendants at Brooklyn House of Detention to get information before they come to Court?

THE WITNESS: That's not our responsibility.

THE COURT: I know that.

THE WITNESS: We went over two or three days a week to arraign there, and this month -- we stopped it in July for the summer. We brought the prisoners over because our program was restricted and we could bring them over and we have continued to do that.

Now that we have a third floor pen and a ninth floor pen.

Q You anticipate arraigning all defendants whether they are in or out in the Supreme Court?

A In the Supreme Court.

Q Are all defendants who are to be arraigned in the Supreme Court produced for their arraignment now that the 299 card is in effect?

A The 299 card is working very well. I get very little complaint about non-production.

Q Well, I am restricting my comments to the arraignment.

Would you say then that ninety per cent of all of the defendants who are called are produced for arraignments in the Supreme Court?

A As far as I know, we have no problem with the production of defendants on arraignment. Sometimes if they are serving sentences elsewhere or where an order is required that the District Attorney or clerks weren't aware of. But I don't know of any problem with producing defendants for arraignment.

Q Did your office receive aggregate gross statistics that describes the number of persons called for arraignment and the number of persons actually produced for any one given week?

A We keep statistics on the number of -- we could get them. We don't compile them every week as to how many are produced and not produced for arraignment.

Q Do you have any problems with production in the conference parts?

A Last time I had a problem was when we brought in the eighteen-month, the first day. Not as many got into the courtroom as I liked and that I issued another stiff memo and I haven't had any problems since.

The conference part happens to be on the ninth floor. Judge Vetrano has long sentence calendars because of the large number of pleas that he takes and he also has long conference calendars, and particularly now since we have -- in order to open another murder part and another rackets part, we had to cut somewhere. So we cut a bail part and we cut a conference part. So he's a very busy gentleman, and when he confers about a case and the lawyer goes in and speaks to the defendant --

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Q So then the defendant is not actually present?

A When the lawyer goes in and speaks to the defendant and comes out and tells the judge the defendant is not interested, there is not much point in bringing the defendant out. And that has always been a problem because he has so many cases, and you have a security problem of bringing so many people in and out, that he did not in every instance -- it slowed him up tremendously -- if you bring a defendant out and say, "Did you talk to your lawyer?

"Yes.

"Are you interested in this type of plea?

"No."

And to do that twenty or thirty times, whether he has spoken to a lawyer. The lawyer has conferred with the defendant. The defendant was not brought out in the conference part as frequently as maybe the defendant would have liked. But there was no point --

Q Is it your testimony then, sir, that for those defendants who are interested in pleas that they are actually brought into the conference part and engage in the colloquy that goes on?

A No, no. If the defendant decides that he is interested in taking the plea then he is brought out. And I presume Judge Vetrano goes through the catechism of taking the

plea.

Q But other than the catechism of taking the plea, they have no actual participation?

A Most judges do not talk directly to a defendant in plea bargaining. There may be a few who do. But most judges do not talk to a defendant in plea bargaining. If they bring them out they will take the plea or they won't talk to a defendant off the record in plea bargaining.

THE COURT: Mr. Alterman, how long do you expect to be?

MR. ALTERMAN: Well, about a half-hour more.

THE COURT: Well, all right, do you want a recess? I am ready to go ahead. We have the reporters

MR. ALTERMAN: Is it okay with you (addressing the Reporter)?

COURT REPORTER: Yes.

THE COURT: Go ahead.

Q So you have no problems with production of defendants for conference brought over to the Supreme Court ever since 299 was adopted?

A We have enough pen space to bring everybody over who should be brought over. I have issued at least four directives that defendants be produced in the courtroom.

Q When did you issue such directives --

THE COURT: Wait a moment. Let me hear this.

A (Continuing) These four directives that the defendants be produced in the courtroom. It seemed a little unfair to the judge in the conference court to require him to slow up his work to bring out people to find out -- to tell them -- to inquire whether their attorney was talking to them about a plea, and whether they were interested in the plea.

But I have had no complaints lately about failure of producing defendants in courtrooms. And a lot of it is unnecessary because the lawyer goes down into the pen and talks to his client and tells him his case is adjourned, and tells him why. But despite that we are bringing them up.

We have one prisoner elevator and there are criminal courtrooms on the third, fourth, fifth, seventh and ninth floors.

Q Judge Damiani --

A Yes --

Q -- are there any problems that you have in production that differ from jail to jail, getting the defendants actually over to the courthouse?

THE COURT: Do you mean as to whether they are in the Brooklyn House of Detention or Rikers Island?

MR. ALTERMAN: Or Sing Sing.

A We have had a running thing with Correction. We

try to cooperate. We cooperated to the point of having the 299's.

The next thing we intend to do is to have one form which is a commitment form on one side and a 299 on the other, an eight by eight card which will go with the prisoners. And it is going to eliminate, we hope, a lot of work in the lower court. We are working at it all the time.

We had a bi-departmental meeting in the spring, the late spring --

Q Do you --

THE COURT: Let him finish.

A (Continuing) -- you are asking me and I am telling you. You know they think we don't give any consideration to any of these problems.

But we had a meeting in the late spring about the production of prisoners chaired by Judge Mara of the Criminal Court, Judge Galarda himself was there, the P.J., and Commissioner Malcolm and his staff, and most of the administrative judges, about what we could do to improve the production of prisoners. We put the 299 in last October and it has been working well. One of the problems that Correction is having at the present time is buses. A lot of the prisoners are sent up to Sing Sing --

Q Why are prisoners sent up to Sing Sing?

A Because everybody complained about overcrowding down here.

THE COURT: I may very well be responsible for that, I suppose, by saying they shouldn't have two in a cell.

MR. ALTERMAN: Yes, your Honor.

THE COURT: In a different case.

THE WITNESS: My information is that our prisons, at least here in Brooklyn where our prisoners are, is about ninety per cent filled.

Q Do people in Sing Sing --

A In fact, let me get to the real problem. The problem is buses. And Commissioner Malcolm came out with a schedule of the buses that have been ordered and when they are going to be delivered. Maybe there ought to be an anti-trust suit against the bus companies who make prison buses.

THE COURT: In fact, there was an antitrust charge about buses generally.

All right, go ahead, Mr. Alterman.

Q Is it your testimony, then, that there is some difficulty in getting defendants who are at Rikers Island or Ossining over to the courthouse for their cases?

A There will always be difficulty. You have prisoners in six different places and any time we try to put

in a procedure with Correction that is a problem. You have about five or six different places, men, women, young adults and adults. And Correction officers work around the clock. You have different correction officers at different times. Every time you have a new procedure there is a problem.

Q You testify that men who have indictments pending in Brooklyn get sent to Kings County; is that correct?

A I wish that were true. No.

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THE COURT: Do you mean Kings County Hospital?

MR. ALTERMAN: Excuse me. Ossining.

Q (Continuing) Men who have --

MR. ALTERMAN: Strike that.

Q Men who have indictments pending in Kings County are sometimes sent to Ossining. What is the criteria --

A Awaiting trial?

Q Yes.

A That's true.

Q Why does that happen?

A I am not the commissioner of Correction and I have no control over them.

Q Okay. Now, you testified that when someone is not produced, a defendant is not produced in the courtroom, that the Judge is supposed to inform your office that that situation occurs, is that correct?

A I didn't say that.

Q Is there such a system?

A I have put out directives which require that they be produced with all the reasons why, the time the prisoners get up; how they are given a bologna sandwich for lunch; that they may getback to prison late and miss their meal; all of those things have been explained to the Judges. And I get figures from the captain in our building from time to time to see how many were not produced by

Correction and were not produced in the courtroom.

Right now, I say it is not a problem.

Q Okay. And is the Judge's compliance with those directives monitored by your office?

A If I find that they do not comply then I speak to them.

Q Have you found that to be a fact?

A Yes. But I have put out four memorandums.

Q Thank you. Now --

A And I think I am the only administrative Judge in the City that did it. All right?

Q Is there any directive ordering a Judge --

MR. ALTERMAN: Withdrawn.

Q You testified that on the Supreme Court arraignments in the Supreme Court that there is in essence a bail de novo hearing?

A Right.

Q You also testified that generally some bail conditions are continued in the same court, those who are in stay in, and those who are out, stay out, is that correct?

A Generally, yes. Generally.

Q Well, would you tell us how long an average arraignment takes in the Supreme Court?

A Well, five or ten minutes.

Q We have had testimony from various attorneys and other personnel who work in the Supreme Court to say that the average arraignment takes about ninety seconds?

A In the Supreme Court? Ninety seconds? That is not my experience.

Q Now, when you also testified --

A No defense lawyer would be worth his salt if he couldn't speak more than ninety seconds.

Q You also testified about the contents of the files that you get when you sit as an arraignment judge. How long does it take an average case to get from the Criminal Court arraignment to arraignment in the Supreme Court, generally?

A Well, there is a rule that if he is not indicted in forty-five days, that he has to be ROR'd. So the District Attorney makes every effort to have him indicted in less than forty-five days.

We have done certain things along those lines. We have given them blocks of indictment numbers. If anyone is to be sent to the Grand Jury, he can write out his subpoenas right there for the witnesses and the police and so on to appear on a specific date before the Grand Jury, rather than to depend upon the mail in Bedford-Stuyvesant and ghetto areas, and where there is transient population, for witnesses and so

on. So right at the Criminal Court, as I understand it, they are given indictment numbers so that they can give subpoenas right there at the hearing for a specific date before the Grand Jury.

Q OK. When does the judge sitting in the arraignment part first see the file of the defendant who comes before him to be arraigned?

A On the day of the arraignment.

Q Does he see it prior to the time a case is called for arraignment?

A No. As a matter of fact, there is not even a folder made up yet.

Q So the first time the judge actually looks at the folder is when the defendant is before him?

A There is no folder. There is only an indictment -- well, there is a folder in the sense that we have the lower court papers. We have the lower court papers, and his sheet, and the indictment.

Q In your experience as an arraignment judge, would you say the Criminal Court judges give reasons on the papers for the setting of bail?

A No, they do not.

Q And the arraignment?

A No, they do not.

Q Do Supreme Court judges?

A No. We may say it on the record. We may say why we do it. I think most of us do.

Q Are copies of those minutes often contained in the file so when bail is going to be reviewed another judge would see why a prior judge set the bail, and whether he did?

A No.

Q Would you think that would be helpful in assisting a reviewing judge to make an adequate determination as to bail?

A I presume it would be helpful. I don't know whether it would be worth the expense because the basic facts are there, his record, the charge, and what the bail was below; whether there was a hearing or not.

Q Now, when you get the file, as a Supreme Court judge sitting on arraignments, is the Criminal Court arraignment minutes in the file?

A Generally not.

Q Do you think that would be helpful in -- to be in the file in showing it to the reviewing judge?

A It would be helpful if it were worth the price to type every arraignment in a lower court, every fixing of bail in the lower court and have that typed up and sent over to the Supreme Court. But it is a very expensive business, so

much a folio.

Q Does this adversely affect the likelihood that the defendant would get a bail change?

A I don't think so. I think I am known as a fairly liberal judge as far as bail is concerned and my opinio is that bail generally in the lower court is low.

Q Is low?

A Not high. Having seen the number of sheets -- the Criminal Court judges think in terms of five hundred dollars.

Q Would you say that is the average bail for a case?

A I would say it is less than average. If you want to add the number of people ROR'd in the Criminal Court.

Q Do you generally set the --

A Seventy-five hundred dollars is high bail in the lower court. And there is no substitute for cash, unfortunately.

Q Well, you have testified that it very well migh be helpful for a Supreme Court judge at arraignment to be abl to have read the arraignment minutes below so that they can make an accurate determination on bail? That is correct, isn't it?

A I didn't say that. There is no reason why the

lawyer can't tell you the same thing -- is not in a position to tell you the same thing he said below. He is there. The defendant is there.

Q I am not talking about a lawyer's argument in terms of bail, but what I am talking about --

THE COURT: I think what Justice Damiani said is that it might be helpful in some cases, but he doubts whether it is worth the expense to try to have it every time.

MR. ALTERMAN: Fine.

Q My question is, isn't it a fact that the protection of individual rights is more important than saving administrative expense?

A As a general proposition, yes, but we don't control the budget.

Q OK. Now, what material is contained in the case file when you get it at arraignement?

THE COURT: We have been over that.

MR. ALTERMAN: OK.

THE WITNESS: I told you.

Q Are dispositions of prior arrests --

MR. ALTERMAN: Excuse me. Withdrawn.

Q You testified you are presently working on getting to the judicial conference all of the dispositions

of prior arrests that happened in Kings County?

A Yes.

Q Is it your testimony that when a lawyer comes before you and says that my client has told me that that arrest was dismissed, that you believe that lawyer, or --

A We ask the defendant frequently right there. And again I have found that they are credible on that question

Q Would you say that --

A -- Maybe ninety-five per cent of the time.

Q So that if dispositions of prior arrests are not filled out, that doesn't affect your determination in the leas

A Not in every case. But I say as a practical matter in setting bail it has not been as important as most people contend, because as a practical matter if there are blanks on the sheet, I have asked defendants and I have gotten credible answers as to what the disposition is. The District Attorney doesn't have anything to the contrary. You can't argue with him. It may be prejudicial that it is an arrest and it may have been dismissed. But if he tells me it was dismissed, I put down there for the next judge or for the time being until they check it out, dismissed with a question mark. But I will take him at his word. I generally have no problem with it. They are generally credible.

Q As a bail setting judge, what is the most

important criteria that you apply for the setting of bail for a defendant?

A Well, as to whether --

MR. HOFFMAN: I object.

A -- (continuing) -- as to whether he is going to appear for trial. That is the most important criteria.

Q Is that the criteria that you follow as a judge?

A Well, there may sometimes be some little variations. Sometimes you may get into the area maybe of preventive detention, which may be anathemic to a lot of people.

Q What weight do you give to --

A For example, you have somebody with a whole series of sex crimes on children --

Q Judge Damiani -- pardon me -- what weight do you give to the prior record and the actual charge before the Court in terms of setting bail?

A I have never figured it out, ten per cent, twenty per cent. But the fact is that we look at to insure his appearance at the trial --

Q Is the major concern --

A -- or the nature of the charge, his record, the punishment to which he is exposed, what roots he has in the community, whether he is employed, family, children, that sort

of thing.

Q Is it helpful for you to have relatives, church people and community groups before you in the setting of bail?

A Definitely.

Q Now, you testified that disposition of prior arrests was usually established eventually in the trial parts?

A What?

Q You testified that after a defendant tells you of the disposition of a prior arrest, that is not noted on the yellow sheet, that it is ultimately checked out?

A Yes, that is right.

Q Is it checked out before sentencing?

A Well, first of all, his own lawyer should check it out.

Q Is there any procedure --

A Certainly the D.A. should check it out. And generally it is before trial at some point. If there is any plea bargaining going on, the bargaining is always made subject to checking the sheet. And frequently we will say that you can have thus and so if that open one is a misdemeanor and thus and so if it is a felony.

Q So it is your testimony that those open dispositions are checked out prior to sentencing, even though the Court officially doesn't check it out?

A No question about it. The Probation Department checks them out, and they have to. I have never sentenced anyone whose criminal record was not completely checked out. And I have never known anyone who did.

Q You are familiar with the Pre-Trial Service Agency, aren't you?

A Indeed, yes.

jm Q You are familiar with the contents of the documents that they prepare?

A Oh, yes.

Q Regarding the background of the defendant?

A The Pre-Trial Service Agencies started in the Criminal Court. I have co-operated with Dick Riken, who is the director, and now there is a man by the name of Ward, I believe, who is the present director, and all his literature and reports I have distributed to the judges. I have encouraged them to make use of that agency. And some of them have. I personally have not had occasion to do it.

Q As an arraignment judge, though, you are familiar with the form that they submit along with the court papers regarding roots in the community, employment, personal histories, and such personal entries?

A Yes, the same as the Vera Foundation.

Q Are you familiar with the fact --

A We give attention to those.

Q You are familiar with the fact that those forms have different recommendations?

A We welcome them, yes. There are other things in the file. I haven't mentioned everything. You take a narcotics case, the police fill out a CR1.

Q My question is, Justice Damiani, in your experience as an arraignment judge, were all of the Vera reports that came before you filled out adequately and appropriately stamped with a recommendation, generally?

A I never had any complaint about them. They were there and they were useful in the sense of knowing things about his employment, and family, and things of that nature. But they were helpful. No question about it.

Q Based on your observations and your testimony as to the NYSIIS sheet and the VERA sheet, and the Criminal Court complaint, is it necessary for you to make an adequate determination as to bail in the Supreme Court to have all of that information completely filled out when you set bail at that time, or can you make a determination without having that material?

A I have set bail sometimes without lower court papers which didn't get there at the time. The only thing that the law requires is that we have a criminal record, that we

have the fingerprint record.

Q How does that affect your setting bail if the information is not complete?

A I do the best I can.

Q OK. Now --

A You know, with what I get.

Q You testified that the criminal procedure law permits seven different kinds of bail in New York State, is that correct?

A Yes.

THE COURT: Do you mean in one of the earlier hearings when Justice Damiani was here before?

MR. ALTERMAN: Yes.

BY MR. ALTERMAN:

Q (continuing) Is the administrative policy in Supreme Court one which encourages the use of some of these forms of bail and discourages other forms of bail?

A There are but a limited number of judges who sit in the arraignment part. They are generally senior judges, the experienced judges, and we try to stay in the area of administration and not determination. I presume the judge knows what the various bail provisions are, what the available bail remedies are. And that is up to him.

Q Which ones are generally used in the Supreme

Court?

A Bond.

Q Yes?

A Or cash alternatives.

Q Yes?

A And the others are rarely used, as far as I know.

Q Well, do you provide the individual justices who sit in both the arraignment parts and also the trial parts a special pen with forms that could be used for other forms of bail other than just bail bond or cash alternatives?

A They are probably available in the Clerk's office if they want to use them.

Q Are you sure about that, because there has been testimony to the contrary?

A I never had occasion to look into it. I myself have only used bonds and cash.

Q All right. You testified that in your attempt to add a criminal part, that one of the conference parts was taken away for the time being.

A Closed, yes, discontinued.

Q How long does it take for a defendant to have his case conferenced in the Supreme Court after arraignment?

A I would say ten days to two weeks.

Q And then if the defendant refuses to plead out,

how long does it take for his case to be assigned to a trial part?

A The case is assigned to a trial part immediately, but he is not produced in the trial part for maybe five or six weeks --

Q In between that period of time --

A There would be no point --

Q In between that period of time, does the defendant have an opportunity to make a motion regarding bail conditions?

A Absolutely. He has a lawyer assigned in the Arraignment Court. The lawyer represented him in the conference part. The lawyer knows the part to which his case is assigned.

And you know the lawyers also have an obligation if they want to see their client they can go and see them in jail as well. That used to be a very good practice which seems to have been discontinued.

(continued on next page)

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Q My question is --

A It depends on if he is staying in in the courtroom instead of visiting him in the jail.

Q Can a lawyer who represents a defendant who is between the time when he refuses to plead out in the conference part, and being assigned to the trial part, make a motion in Special 10 for reduction of bail?

A The case is never in Limbo. It goes from arraignment to conference to trial part. The defendant will not be produced in that trial part for five or six weeks, because there are fifty or a hundred cases ahead.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I think we are covering some ground that has been gone over adequately before.

Q Are there directives ordering judges to reduce bail for incarcerated defendants every 90 days in the Supreme Court?

A There is --

Q Can you tell me when that policy went into effect?

A The directive was some time ago.

Q How long ago?

A It is unnecessary. An oral application for bail can be made at any time. They can write a letter at any time. That was some time ago, and I don't remember when.

Q Briefly, what is the review procedure that an individual trial justice is supposed to follow?

A I have not been insistent on thirty days or sixty days --

Q Is the compliance ever mandatory --

A I would say while the directive came out, maybe two or three years ago, it's been abandoned.

Q Okay.

A There is nothing to prevent any trial judge from doing it if he wanted to. I don't insist.

Q Judges don't file reports with you regarding the review of --

A That's right.

Q Now, do you know the average -- do you know the average number of days notice a defense counsel would receive prior to trial under your new system of calendar control?

A I have no idea, except he knows when the case is assigned to the trial part. He knows every adjournment. He is there at the time of the adjournment and I guess he can follow the calendar as well as everybody else.

Q If he is not there, is there any provision you have in your office, about notification other than orally?

A We have cases where we have to send out a written notice.

Q Is it your testimony you do send out written notices to counsel?

A There are various ways. We have just taken over the

calendar. This is one of our biggest problems. The District Attorney sent out notices and that spoiled the Bar. They didn't show up if they didn't get a notice. We have eliminated sending out the written notice and do exactly as they do in the Civil Court.

In a negligence case, the lawyer knows the case is adjourned and he tells his client to show up on the return date. We save thousands of dollars in postage and unnecessary delays, and it has been working pretty well.

Q What are the bugs?

A Where a defendant is brought in on a warrant, or whatever, where we do notify the lawyer.

Q Is there any Court rule to assure uniformity and rule enforcement of control of the calendar in the individual trial part, or is that basically set by the Judges themselves?

A You have got in evidence -- well, the calendar was only taken over July 29th. You have the two memoranda I issued, which explains the procedure.

Q You testified that the Judges now prepare the master calendar --

THE COURT: One minute. Your memorandum of July 25, says the procedure for notification of defendants will be the same as outlined in the

directive on sentencing date issued this date.

THE WITNESS: Yes. The same as the civil --

THE COURT: I don't think we have a memorandum about sentencing date. For completeness of the record, we should have that.

Mr. Hoffman seems to have it.

THE WITNESS: It is repeated in the next memorandum.

MR. ALTERMAN: I have no objection.

THE COURT: Suppose we mark that Exhibit B1.

Q I think last year, there was testimony that the ready rule contributed to trial delays, because the District Attorney's office marked everything ready.

Will the control of the calendar by the Judges, abate that problem, and how so?

A That is my expectation.

Q How will it?

A The Judge has the calendar. He starts out with the calendar, and he has adjourned every case on the calendar since it first appeared.

That will apply to the future as well. He recreates the calendar by giving the adjournment.

He listens to both sides.

The tendency under the other system for the District

Attorney to put cases on, and the District Attorney wanted a trial, he is a winner, and the defense counsel wanted to try their winners.

Now, the Judge will decide in what order the case will be tried. He has the entire -- there will be a master calenda in every part.

Q He actually moves cases for trial?

A He sets the order for trial. "This will be tried first second, third" and so on.

Q Is there a priority of jail or bail cases?

A I said so.

Q Is that solid?

A Asfar as I know. I think the Judges are making real efforts.

Q Is there a priority for older cases to be tried?

A Yes. And all the jail cases.

Q Is there any rule to assure uniformity so that your --

MR. HOFFMAN: Your Honor --

THE COURT: I will sustain the objection. It has been pretty near an hour and a half that you have been on cross examination, and a lot of that, we have in the record already.

Q Is there any official policy towards granting

pretrial evidentiary speedy trial hearings for those defendants who complained of not receiving speedy trials or is that left to an individual Judge on a case to case basis?

A I don't understand. If they make a motion to dismiss for failure to furnish a speedy trial --

Q Yes?

A The motion is made in part one. All motions are made in part one, and are referred to the trial part.

Q There is no policy?

A Policy of what?

Q Your office stating to your Judges that they could in fact --

A It is not self-generating --

Q Okay.

A The defendant has to demand a speedy trial or make his motion.

THE COURT: What type of evidentiary hearing would you mean, Mr. Alterman? Here, if there is a speedy trial habeas from a State prisoner, I may have to get, not necessarily testimonies, but some facts from the District Attorney as to who is at fault. If you have a case assigned to a particular Judge, the Judge would probably know there might be some questions to take up as to whether there was a really missing

witness that caused the defendant to delay, or whether lack of communication between the attorney and the defendant --

MR. ALTERMAN: That's what I was getting at where the defendant complained of the continuing of a denial of a speedy trial, a violation under the Sixth Amendment, and demands that a pretrial hearing be held with respect to the same thing you talked about, the delay and the reason for the delay, and I was asking the Judge if there was any official policy on that.

A I don't know how I can have an official policy. A motion must be made by a defendant, and each case is handled separately.

THE COURT: There is no rule where you do or do not have a hearing as to the four or five factors that are in the Ringo case?

THE WITNESS: That is up to each individual Judge, as to what record he wants to make.

Q To your knowledge, have any of those motions been granted in Supreme Court, Kings County?

A I presume so.

Q In your experience as judge, did you ever grant a motion for failure to provide a prompt trial?

A I think I dismissed several. I can't put my finger on

any --

Q There has been testimony that all motions have to be made in Part 1, even though a case is assigned to a trial part. What is the reason for it, and how long does it delay an average case?

A The reason is the motion is made in Part 1, because we find the motions made there, first of all, the District Attorney has someone from the Appeals Bureau there who is quite expert on motion papers and motions being made there, and it does not disturb the Trial Judge. We have 37 courtrooms going. Frequently, they can see on the face of the papers that there is something -- for instance, one of the rules is the co-defendants have to be joined.

You may find that a co-defendant hasn't been joined. That is taken care of in this Part 1. When the papers are considered adequate, then the Trial One Judge refers the case to the trial part. And each trial part gets its own little motion calendar after the cases have been called in Part one.

Some motions are disposed of in part one, but most of the pretrial motions are referred to the Trial Judge, and he has a motion calendar, and at his convenience, he can set up whether he wants to hear argument without interfering with jury trials.

THE COURT: It seems to me that you are on a

matter of internal administration, certainly beyond my function to deal with.

Q You testified that in May and June of this year, that you held conferences with respect to the number of defendants detained in Brooklyn for over 18 months?

A That is correct.

Q You testified that presently there are plans to investigate the number of defendants who are in jail over 12 months?

A Yes, we are keeping that current.

Q Could you tell me how many men were actually released or paroled as a result of those conferences?

A I think so. This is a report that I wrote to Judge Sander for the Deputy Administrative Judge on June 18th. I am submitting the following results of the conference on bail review of jail cases, and this is as of June 14th. The totals are cumulative and include the figures previously included.

"Cases conferenced and bail reviewed, 968. Dispositions, 255. Bail reduction, 86. In addition to the 255 jail cases, the Judges also disposed of 298 bail cases."

Q How many people --

A Let me finish and you may know by my answer. There were

124 dases where the defendants were incarcerated for 18 months or more.

70 of those defendants were charged with murder. Of the 124 cases, there were three dispositions and five cases in which there were reductions of bail.

No action was taken in the remaining 116 cases for the following reasons --

Q Judge --

THE COURT: Let me hear what the reasons are.

(Continued on next page.)

A There is what we are continuing to keep statistics on. Judge Breitel and Judge Bartlett are interested in delays in commencement of trial attributed to the defendant, for example, caused by the defendant's request for adjournment, motions to vacate guilty pleas, and discovery proceedings.

Going back to the figures of the 116 cases, where the defendants waive speedy trial, there were two; defendants serving prior sentences or confined on other charges, 22; prior mistrials, 3; psychiatric proceedings pending or completed, 21; defendant hospitalized, 1; pretrial proceedings pending, 1; no change in trial date set, 47. That made a total of 116.

Where more than one of the above reasons applies to defendants' incarceration, the principal reason was selected in order not to place the case in more than one category. The foregoing constitutes my final report.

Q How many people were released as a result of the --

A I could tell you that there were 86 bail reductions. And of the 124 where they were incarcerated for 18 months or more, there were 5, only 5 reduction.

Q In the more serious cases, the bail remained higher or there was no --

A That is correct.

Q That's 124 cases over eighteen months, how many cases over twelve months?

A I don't have that figure.

Q You don't have the figure of how many people actually were released as of crash conferences?

THE COURT: The Judge says the bail was reduced, it doesn't say they were released on their own recognizance.

THE WITNESS: What you can deduce from this is this: If someone has been in jail eighteen months or twelve months, their bail has been looked at numerous times. And it is probably as low as it can get.

Q Do you think after eighteen months in jail, a case coming to trial is reasonable?

A No, I think it is horrendous.

Q Okay.

Last summer you testified a committee alleviating overcrowding in the city jails and court congestion was formed.

A Yes.

Q Is that committee still in effect?

A No.

Q Can you tell us --

A I don't think it is necessary any more.

Q You testified before you think you still have a

problem with the backlog?

A I don't think there is much we can do that not doing with what we have. I don't think we can make any more changes in procedures. Most of the problems were beyond our control. It's getting additional personnel, training programs for personnel, more buses to get up to Sing Sing, more clerks, more probation officers to supervise --

Q Justice Damiani, I think a day after this court issued its injunction in March of '74, both the city administrative judge Ross and state administrative judge Bartlett released press statements to the effect new plans would be undertaken to assure defendants' prompt trials who wanted them.

Has a plan been issued as of this date?

A Yes. I indicated that we are filling out the machine record forms on all cases where a defendant has been incarcerated for twelve months and every time that case is called or comes up that machine record form goes to the office of the court administration. We hope to get it down to six months ultimately.

I think we are giving a lot of attention to the eighteen months.

Q Once that machine record goes over to the court administration, how does --

A Judge Breitel said if we don't improve, or he is not satisfied with the progress, he is going to get people who will improve it.

THE COURT: Does that mean you won't be administrative judge, if Judge Breitel is not satisfied?

THE WITNESS: That may well be.

Q Can a defendant get a speedy trial in Kings County within six months if hewants as of this date?

THE COURT: Incarcerated defendant.

A I can't say that would happen in every case. There are a lot of cases where they could.

Q Would you say that fifty per cent of all defendants could get a trial within six months?

A That would be purely speculative.

MR. ALTERMAN: I have no more questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. HOFFMAN:

Q Judge, during the early part of 1974, of this year, was there any increase in the number of trial parts?

A Yes, we had the narcotics part, that was an increase. We had eleven narcotics parts established under the Rockefeller program. That has helped a great deal.

Q The figures of the management planning unit are

gross figures for the entire court; is that correct?

A That's right.

MR. [illegible]FFMAN: Thank you.

MR. ALTERMAN: I didn't hear the last question. Can you read that back, and the answer?

(Whereupon, the last question and answer were read by the Reporter.)

MR. ALTERMAN: I have no questions but I think one of the named plaintiffs Mr. Jenkins who cross-examined Judge Damiani would like to examine.

THE COURT: Well, two or three questions I will listen to you. That is a long sheet that you have in front of you. I think we imposed on Mr. Justice Damiani quite enough.

MR. JENKINS: I am going to hold it to the narrow issue of coercion.

CROSS-EXAMINATION

BY MR. JENKINS:

Q You just testified that the Legal Aid attorneys are generally better than 18B attorneys. Does that include the special list of 18B attorneys that are assigned to the indigent jail cases with regard to murder cases?

A I don't understand your question.

THE COURT: He said would you say that

generally the Legal Aid attorneys are better than the special panel of 18B attorneys in murder cases?

THE WITNESS: No, I wouldn't say. I would say the 18B lawyers on the murder panel are pretty well qualified lawyers. And I will say this: The judge doesn't have to take them off that list in any particular order. The judge knows a lot of the names of the lawyers who are on there. And he picks names. For example, Mr. Brackley or Mr. Lombardo.

Q What percentage of the 18B is it that you speak of?

A There is an adequate number and we never had any trouble finding qualified lawyers for murder assignments.

Q I am speaking in terms of the 18B on the special list that all they handle are those particular cases with regard to the arrests of 18B.

THE COURT: If there are 50 on the murder list, how many are on the entire panel?

THE WITNESS: I have no idea. Mr. Spinakos is the director and he takes the names off his list. When we see a list on 18B assigned to murder, we don't know who else is on the list.

Q Isn't it a fact that since this Court's ruling on speedy trials has been reversed Kings County has used that

situation to get more guilty pleas?

A No. As a matter of fact, if you take a guilty plea and the judge was wrong in denying your motion to dismiss for speedy trial, you can take that up on appeal. You can take a plea and your motion for a speedy trial can be reviewed on appeal. If the judge was wrong, they will vacate your plea and dismiss the indictment. It is the same as on a motion to suppress. If the judge was wrong in not suppressing evidence, that can still be reviewed on appeal.

(continued next page)

Q Do you treat a jail case differently from a bail case with regard to plea conferences?

A No. The only thing is this: when somebody has been in jail, he's got some time in, and you can usually do more for him than you can for somebody who hasn't had any time in. There is a big reluctance to come in and go to jail.

Q So a jail case is conferenced out of the defendant's presence?

A Generally the judges do not discuss pleas of bargaining with a defendant present or his family. Now, there may be some judges who do it, but a lot of us consider that a bad practice because the DA says something about you which you don't like and you might get very upset and that will be the end of the case.

But the case is fully discussed in the conference with the lawyer. The District Attorney makes an offer. The judge indicates whether he'll approve the offer or not or what kind of a promise he will make and then before -- when the plea is taken, as you probably know, the judge should tell you what you are charged with, what plea is it you are taking, whether it's a felony or misdemeanor, what the punishment is, what he proposes to do in the way of punishment, if he is making that kind of promise, and what other conditions he is putting to the acceptance of the plea.

THE COURT: I think what Mr. Jenkins was trying to bring out was whether a defendant who is at large on bail is in the courtroom or out when this plea conference is taken. Even he would be out of the courtroom most of the time.

THE WITNESS: Well, first of all, some judges hold their plea conferences in the robing room behind the courtroom and I would say rarely -- in my experience I never have a defendant in on the conference, and I think most judges do not. If a judge is holding a conference from the bench, as some of them do, if a defendant -- whether -- if he is on bail, he may overhear some of the conversation and maybe he might have been brought out to discuss the case with his lawyer in the courtroom before he took the plea. He might overhear some of that conversation.

But generally defendants or their family aren't in on the conference. Sometimes he makes an offer and may want to speak to his family before he accepts it.

Q How long does it take the Kings County to deal with a coram nobis proceeding?

A It depends on the coram nobis.

THE COURT: I am not going into coram nobis proceedings. That's a separate problem, Mr. Jenkins.

MR. JENKINS: I wanted to relate that to the issue of coercion.

THE COURT: Coram nobis comes after conviction. So I don't think that is relevant here.

MR. JENKINS: What I wanted to ask him -- the next question was, isn't it a fact that the majority of coram nobis proceedings, the basis of them are coercion, coerced pleas?

THE COURT: Is that a fact, Justice Damiani?

THE WITNESS: I don't know if there is -- one ground for a coram nobis could be that a plea was coerced, yes, we have had those applications.

Q Well, this may not be admissible, but I took a minor survey of everybody that I have come across and then generally they come across the ninth floor, the Brooklyn House of Detention when they come down from upstate or coram nobises, and the majority of them, I would say 90 percent, that have come down on coram nobis, the basis was coerced pleas.

Now, I said that --

A I don't know if that's the percentage, but I suppose -- most dispositions are made by way of plea and then if somebody is unhappy with his sentence or maybe the way the plea was taken, he makes an application on that ground.

Q Briefly, can you define what is "coercion"?

THE COURT: Please. Don't let's go into law.

Q When a defendant --

A "Coercion" means if you are forced to do something, compelled to do something.

Q When a defendant who is testifying against another, be he a co-defendant or not -- why is it a practice of Kings County not to sentence him until he gives the testimony favorable of the District Attorney?

MR. HOFFMAN: I object to that.

THE COURT: I will sustain the objection on that. That's not within the issues here.

A I would like to send him away happy.

If you have co-defendants, the District Attorney will -- may make it a condition of his plea, taking a plea from a defendant that he incriminate his co-defendant.

Q But the point I am trying to seek is why is it --

A That's his problem. That's his --

Q Why is it mandatory that he not be sentenced until he gives that particular plea?

THE COURT: That's not within the issues on this trial and we are taking a good deal of time now.

MR. JENKINS: My next question --

THE COURT: Ask your next question.

Q Is it possible for that practice to be used to

coerce people to plead guilty?

A A District Attorney may say to Defendant A, "I won't take your plea unless you incriminate B, who was with you," and that's his condition of the plea. He controls the plea.

Q Do people plead guilty who have been in jail a longer amount of time than people who have been in jail a shorter amount of time or people out on bail?

A I have heard that said, but I don't know. I say you may get more pleas from people in jail or get them sooner because they have been in jail and when they had made an offer -- let's say you have got five months in and somebody is offering you a year, which may mean you have to do eight months, the inclination may be to take the plea. Somebody who is on the street won't want to come and take eight months.

Q So generally it's the guy who is in jail --

A It's human nature, I suppose. I have never known -- well, all I can say is I have never taken a plea from a person who I thought was innocent.

Q You have never taken a plea from a person you thought was innocent?

A That's right. I won't even take one of those --

THE COURT: Sorrano plea?

THE WITNESS: I won't take a Sorrano plea.

Q What is the basis of you determining in your feelings that you just said a person being innocent or guilty?

A I ask him about the facts, I ask him to tell me what happened in his own words.

Q On that basis you make a determination yourself before a jury is picked if he is innocent?

A No, no. I say if I take a plea, I ask him -- I ask him the facts of the case, what happened in his own -- let him tell me what happened.

Q Then you make that determination?

A That's right. Unless I think there is something wrong with you mentally, I will believe you.

Q In a jury trial do you also deal with that process?

A I don't make any findings. The jury makes the findings.

MR. HOFFMAN: Objection.

THE COURT: Confine yourself to questions you had listed there. You are getting somewhat remote.

A The jury finds him guilty or not guilty, not me. I only sentence, if I have to.

Q As administrative judge of Kings County do you have any knowledge of a defendant ever being coerced to plead guilty?

A I have set aside convictions where I felt the plea was coerced, yes.

Q Coerced -- the fact was brought out, and you believe in accordance to whatever proceedings it was that he was coerced?

A I believed the defendant. I had one case where the minutes indicated that the judge had indicated that the maximum was twice what it was in fact and I set that one aside.

Q Is there any judicial or any administrative disciplinary actions with regard to people being coerced by officials of New York State, be they the Bar, the District Attorney, judges?

A I don't know what you mean.

THE COURT: Well, if you set aside a plea as coerced, would you start any discipline against the District Attorney or the judge?

THE WITNESS: I have never had that type of case.

THE COURT: Anything else, Mr. Jenkins?

MR. JENKINS: Yes, one more question.

THE WITNESS: Usually it's not coercion. It's misunderstanding. The judge didn't intend to fool the defendant by saying, "You can get 60 years," when the most he could have gotten was 30. He just made a

mistake but the defendant shouldn't have been exposed to that, so I set the conviction aside.

Q With regard to 190.50 of the Penal Law -- of the Criminal Procedure Law, that gives a defendant the absolute right to testify at the Grand Jury. Now, if a defendant at arraignment raises that issue, that he was not given that right or advised of the right in Criminal Court and did not have a hearing in Criminal Court and the District Attorney in the local Criminal Court secretly removed the case from the Criminal Court into the Grand Jury, obtained the indictment and it goes before you and the defendant raises that issue, what do you do?

A Well, that can be the subject of a pre-trial motion and if I think there is some substance to it, we'll hold a hearing and see if that's so.

Q Have you ever dismissed an indictment based on that?

A No.

MR. JENKINS: No further questions.

THE COURT: Thank you very much, Mr. Justice Damiani. You have been very patient and I know it takes your time and my time to hear all this and decide what is in my function. I am glad, when I was reversed, maybe some incentive has been given to the Legislature to help you more.

THE WITNESS: The thing I am interested in is I think we have been maligned in many areas. A lot of us have given a lot of time, attention and work to the system and we are not responsible -- we are blamed for things over which we have no control. I think basically a lot of it is priority in funds.

THE COURT: If you had the mandatory powers over the budgets that the Court used to have, maybe I wouldn't be sitting here.

All right, thank you.

(Witness excused.)

THE COURT: Now, where do we go from here? You have another witness you wanted to bring on?

MR. WEBER: I have one witness here.

My direct case won't take long. But cross can take forever.

MR. ALTERMAN: I object to that characterization.

THE COURT: Suppose I start the direct now and then we will have to continue after lunch.

MR. LATIMER: It is 1 o'clock.

THE COURT: I want to find out who the witness is and what he wants to talk about.

(Continued next page.)

THE COURT: I don't know where the lawyers are, I assume they will show up in due time.

Proceed, Mr. Hoffman.

H Y M A N  B A R S H A Y , called as a witness, having first been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q Judge Barshay, will you state for the record your experience as a State Supreme Court Justice, and particularly your experience as a Criminal lawyer in the field of criminal law?

A For the greatest portion of my life I specialized in administration of criminal justice both as a prosecutor, counsel for the defendant, as a Judge in five Courts; as a teacher and as a lecturer. I was admitted to the Bar in 1924. I practiced law from January 29th, and then I was appointed to the District Attorney's Office, Kings County on January 4th and remained there as an active prosecutor in every phase of criminal law until January 1, 1940 when I practiced law until 1951 when I was appointed to theBench, special sessions proceeded by short term in the Children's Court. I was elected to the County Court in 1953, became a Supreme Court Judge by consolidation in 1962. I was reelected in '68. Because of my age, my term expired two

years ago and the Appellate Division certified me as a retired Justice. That's the position I now hold.

THE COURT: You have been more than 50 years a member of the Bar.

THE WITNESS: As of January 1.

Q And Judge, at the present time are you sitting as a Judge in Criminal matters?

A Exclusively.

Q And has that been your primary assignment on the Supreme Court?

A I would say 99 percent of the time.

Q What part are you currently sitting in now?

A I sit in the Trial Term Part II, which is a homicide part. I have been there for three consecutive years, and in addition I sit in Special 10, and that's the bail review part and I've been there about similar number of months or years.

Q Judge, will you describe the purposes and the functions of Special Term Part 10?

A Special Term Part 10 was created to review bail set by other Judges for the purpose of either paroling or reducing the bail -- and I prepared for the convenience of this Court, recapitulation of proceedings had in Special Term Part 10 from January of 1974 to September 10th.

Q And was this recapitulation prepared by your staff at your direction?

A Yes, I have a daily calendar upon which I make entries every day. And at the end when I was told that I would be here I prepared that for the convenience of the Court and gave you a copy. I have a copy and one for the defendant.

THE COURT: Let's mark it in evidence.

THE CLERK: Exhibit B in evidence.

(So marked.)

Q Judge, how often do you sit in Special Term Part 10?

A A regular schedule is on Mondays and Thursdays but any other day to suit the convenience of anybody at all, where it doesn't interfere with the case actually on trial.

Q And how does a defendant get his case placed on the calendar in Part 10?

A Either pro se, by communication directly to the Clerk of the Court or to me, or through his counsel on written notice of motion to the District Attorney.

Q And is it necessary for the defendant to have normal motion papers in order to have his motion heard?

A No, it isn't.

Q Now, when a defendant appears before you, is it

necessary that the defendant be represented by counsel in Special Term Part 10?

A It is preferable but not mandatory. I prefer to speak to counsel instead of speaking directly to a defendant.

Q And do you permit witnesses or family members or other people to address the Court on your bail determinations?

A If the application by the attorney or the defendant to me -- my mother and father are here -- who else wants to speak to the Court I invite them up, give their name and address and I let them talk to me. I don't put them under oath.

Q And Judge, what is the criteria that you evaluate in judging bail evaluation in Part 10?

A First the statutory one is Section 510.30 which enumerates the matters that I should take into consideration. I have the section here, if you want me to read it.

THE COURT: I don't think it's necessary. I have the writ in my chambers.

Q Judge, do you also take into account the length of time that a --

A The first question that I ask and I put on top

of the name "In" meaning how long he's been, blank number of months, are very important to me because I especially -- lately I insist that those who are in for a long time must have their cases tried and if it's on my personal calendar I tell the District Attorney they must be tried and I fix the order in which they are being tried, especially since the new system is involved, giving us the power to handle our own calendars. I'm trying this very day a '72 case that I forced on trial.

Q Judge, is a defendant permitted to make repetitious applications to Special Term Part 10?

A I very often -- I say without prejudice to renew, and I write it down, without prejudice to renew.

Q And are there defendants who come before you on numerous occasions for bail review?

A Not numerous, reasonably often.

Q Judge, based on your experience in Special Term Part 10, can you give the Court an approximation of the frequency with which you either lower the bail or change the bail in some way that's been set by the trial Court?

A That's illustrated in the chart that I prepared for the Court. With your Honor's permission may I just read the first page. This is the summary so that the defendant can hear it.

THE COURT: They are the plaintiffs in this Court. I'm puzzled by what you mean by a motion to fix bail granted.

THE WITNESS: It means that I have reduced the bail, your Honor. In January I had 47 applications on my calendar, I granted 33 and I denied 14.

THE COURT: 14 times you let the bail stand and 33 times you reduced it to some extent.

THE WITNESS: Yes.

THE COURT: YOu don't know how many of those 33were able to make the reduced bail? Do you have any figures on that.

THE WITNESS: We don't have any figures with respect to that because they may be released through another part so it wouldn't be before me.

In February I granted 25 applications to reduce bail and denied 17, having heard a total of 42. In March of 48 motions I granted 34, denied 14. In April I had 46 motions, granted 29 and denied 17. In May I heard 34, granted 26 and denied 8. In June I heard 63 granted 52 denied 11; in July I heard 83, granted 65, denied 18; and in August I heard 62, granted 45, denied 17; and in September up to the 10th, I heard 11, granted 10 and denied 1. In addition to that I

heard bail applications, stay of executions on appeal.

THE COURT: Let counsel come forward. Mr. Barshay was here since 11 o'clock, let him start testifying.

MR. LATIMER: I apologize for being late. I thought our calendar was for 11:30.

THE COURT: It was for 11:30 but I thought you would be here at 11:30, somebody said they had seen you before.

MR. LATIMER: I apologize to the Court.

THE COURT: Judge Barshay testified he was admitted to the Bar since 1924 and is sitting under certificate of the Appellate Division after 23 years experience in the Court before then, and that he's been sitting particularly in Special Term Part 10 hearing bail applications. When I asked him about the bail applications he said he couldn't tell how many of the defendants whose bail had been reduced were actually released from custody. I think we are at that point.

DIRECT EXAMINATION

BY MR. HOFFMAN: (Cont.)

Q Judge, how soon after an arraignment may a defendant apply to Special 10 for bail reduction?

A Immediately after the conference part assigns him to a part he can come in the next day.

Q And will you entertain a bail reduction motion at that very early stage?

A Yes, I will. Any time an applicant wants to be heard either by letter or by notice of motion.

Q Now, do you think it would be possible for you to conduct evidentiary hearings in every case?

A If it's requested. I wouldn't say every case, it would depend upon the merits of the application. Strange to say, your Honor, I have no recollection of any lawyer asking me for an evidentiary hearing on the question of bail, up to date. I have no recollection.

Q If you review the bail that is set, what is the information that is before you on the Bench?

A The oral argument -- generally the lawyer will tell me how long he's in, his age, his background, his occupation, his roots, his constant appearances whenever the case was on. He's never forfeited bond in any proceedings that he's ever had, things of that nature, the gravity of the charge, the likelihood of his remaining under the jurisdiction and his appearance, and that's the basis.

Q And do you ever inquire of the defendant about his past criminal record? What is your practice?

A My practice is never to talk to a defendant if I don't have to, because I believe you don't have to answer that question they raise later on in second defendant proceedings. I wouldn't want to harm a second defendant without counsel, but I ask the lawyer, I tell the lawyer in addition when he comes in before me, he should know all about his defendant, his arrest, his dispositions, his sentences or his paroles, things of that nature. So I receive some protection in dealing with a defendant.

Q Are all defendants produced in your Courtroom at the present time when their bail reduction motions are on the calendar?

A None are except when they appear in person. It's not a requirement. I ask them about their lawyer and there are occasions when I order the Clerk to telephone the lawyer, set it down for 2 o'clock or the next day. I prefer to deal with counsel.

Q Do you ever release a defendant on his own recognizance?

A I have, yes.

Q What would be the typical situation where you would use that remedy?

A First if he's been in a long time and the gravity of the situation was not too great, that's very

important to me, and I fix very low bail or parole him. I have a lady now, her name is McNeil, after trial I paroled her, the jury disagreed, homicide case; I paroled her two weeks ago I had two defendants I put him out on bail $100 each, one didn't show up for a few days, eventually he did. I was relieved of the fear that I would be criticized in the event one of them would have committed a crime of a serious nature and I would be subject to criticism.

Q Do you also inquire with respect to speedy trial motions?

A I always say to the lawyer, did you move for a speedy trial. I want you to do that forthwith. I want you to make your motion for inspection of the grand jury minutes, motion to suppress, motion for bill of particulars which regrettably is not being complied with. I should like to have it complied with because the District Attorney has his problems.

Q Judge, how long has Special Term Part 10 been in existence in the Supreme Court?

A I think about three years that I recollect. I think I started it-- that is I was assigned there.

Q Who can a defendant appeal to if he's not satisfied with your ruling?

A Appellate Division.

MR. HOFFMAN: That's all.

THE COURT: Mr.Latimer, do you want to ask anything.

CROSS-EXAMINATION

BY MR. LATIMER:

Q Judge Barshay, can you explain to the Court and to us exactly when a bail reduction motion comes before you in Special 10?

A The moment a defendant and/or his attorney are dissatisfied with the bail conditions in the trial part. He has the privilege the next day to come in before me, and I like to have a calendar on Mondays and Thursdays because I'm in the homicide part, it's a very busy part, but I don't limit it. I prefer to have it on Monday and Thursday but you could come in any time you like, short notice.

Q Motions in Special 10 can be made on short notice?

A You can, I accept them.

Q Are they made on papers?

A Wherever there is an attorney they are made on papers; wherever there is a defendant in pro se he writes a note, a letter, a request and it's put on my desk and I add it to the calendar.

Q Is that letter sent down to the trial part in

the first instance or does it come directly to Special 10?

A As long as it's on my calendar, I don't know whether it went to the trial part, but I make inquiry what is the bail now, who set it, when it was set; so that I know I would be reviewing not an original application but a review of another Judge's action.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. LATIMER: (Cont.)

Q The original, the bail is originally fixed at arraignment?

A Yes, but after arraignment it goes to a trial part and that Judge has the right to reduce the bail.

Q Do you have in Special 10 -- hear motions before a bail reduction -- motion is made in the trial part on a reduction on bail from the arraignment Judge's examination?

A I can't point to that situation but I wouldn't bar it.

Q And if a defendant is dissatisfied with your determination at Special 10, what is his remedy?

A Appellate Division.

Q Now, you testified that Special 10 sits on Mondays and Thursdays?

A Let's put it this way; Special 10 is in the same Courtroom where I sit in Part 2, the calendar is called on Mondays and Thursdays. If lawyers want to serve notice of motions I ask them to make them returnable on Mondays and Thursdays, but if anybody wants to be heard on a Tuesday or Wednesday I accomodate them. I'm there anyway.

Q An attorney other than Legal Aid who is

unfamiliar with the particular practice of Special 10 in Supreme Court, and he makes a motion to Special 10 on papers, that is returnable on a day other than Monday or Thursday?

A If it's convenient I ask him to come back because the District Attorney should be represented, and on days other than Mondays and Thursdays the Special Assistant assigned to Special 10 wouldn't be in the Courtroom and I like to hear both sides.

Q Can you tell us approximately how many motions you hear on a typical day in Special 10?

A On a daily chart, sir -- I didn't make a record -- yes, I did. It's attached to your exhibit. Every month you could see the number of motions, for example in January, 2, and I itemize them number per day. On the 7th I had 2 motions; on the 10th, 7; on the 11th, 3; on the 15th, 1; on the 17th, 3; on the 18th, 1; on the 21st, 4; on the 24th, 9; on the 25th, 1; on the 28th, 7; and on the 31st, 4 and it varies.

Q And do you call the Special Term Part 10 calendar before or after?

A First thing in the morning, that's a 10 o'clock must.

Q And can you give us an estimate of how long each particular motion takes to be argued and heard and

decided?

A Some lawyers had hit the nail on the head in two minutes; some talk and talk an unreasonable length -of time, but by experience I ask the questions so I could get to know the situation as quickly as possible.

Q Now, when a motion is made to Special 10, can you tell us exactly what written information, papers, documents and so on you have before you?

A The affidavit of the attorney and/or the affidavit of the defendant. The answering papers are the District Attorney's, if any are submitted. In a great many instances the District Attorney just gives me a summary of the gravity of the offense, the record of the defendant, and sometimes they consent to the reduction and sometimes they vigorously oppose, but the important part is if it's a long delay case I direct that the case be tried as quickly as possible. If it's before me I can enforce it, but I always say if it's before another Judge, will you please tell the Judge to give it a preference and try to get it on trial, if not come back.

Q In terms of the information before you, you don't have the entire Court file before you in Special 10; is that correct?

A It may not be in full. It's present in the

Court in the form of an envelope or a folder. If I need it I ask for it but those occasions are rare. Most of the information is conveyed to me either by them or by the questions which I elicit.

Q Do you yourself ever look at the ROR sheet which used to be prepared by probation and now is prepared by the pre-trial service agency?

A I look at it but you need better eyes than mine to read that report. If you had seen -- I'm sure the form isn't too clear, your Honor.

THE COURT: All right, but the information is elicited, that's the point.

Q Do you have that document before you or do you just rely on the District Attorney's summary of the information?

A Very many times the District Attorney will say here's my report, and sometimes he hasn't got it and I ask him in detail, but I instruct the lawyers when they come in to be prepared -- "My client has never been convicted" -- I'm interested in arrest too on a question of bail.

Q On the question of defendant's arrest and convictions, I think you testified you look at the Nice's report?

A If it's presented to me and I could make it

out.

Q Do you ask the District Attorney forthe Nices report?

A He gives it to me. I don't have to ask him, either he'll hand it to me or he'll have his own chart, he'll say 1955 was arrested for this, case dismissed; 1965 he was convicted of that and I'll read it all along.

THE COURT: I think Mr. Latimer is going to ask you about the blanks on the Nice's report. I wonder if I could just take a break long enough to receive an indictment.

(Whereupon matter stood in recess.)

(After recess.)

MR. LATIMER: We are going to call Mr. Gallagher in rebuttal if we could --

THE COURT: I have a second date down for this.

MR. LATIMER: We didn't fix a date.

THE COURT: Complete Justice Barshay's testimony.

MR. LATIMER: Yes, your Honor.

CROSS-EXAMINATION

BY MR. LATIMER: (Cont.)

Q We are talking about the prior record of the defendant, and you stated that at times the District Attorney would hand you his summary of the defendant's record?

A He wouldn't hand it to me, recite it to me; what he would hand to me is that report that I said is so difficult to read.

Q The Nice's report. In your experience, does the Nice's sheet contain, or theyellow sheet which happens to be applicable in the particular case, contain up to date accurate information as to the dispositions of prior arrests?

A No, very seldom up to date; so I make inquiry of the lawyer.

Q You make inquiry of the defense counsel?

A Yes. I tell the lawyer be prepared to come before me -- to go through the entire arrest record in and out of the State. They could find it out by just talking to the defendant.

Q Have you ever asked the defendant himself?

A I told the Court I prefer not talking to a defendant, but if he is before me, pro se, I have to; but I advise him he doesn't have to answer me if he doesn't want to.

Q In the cases that you have asked a defendant to up-date the Nice's sheet, have you found his answers to be accurate and responsive?

A I can't say that I found anyone to be untruthful -- may not be complete -- but I haven't caught anybody

yet.

Q Now, you also stated that you consider arrest as well as convictions?

A I think so.

Q What weight do you give in your determination to a person who had arrests where the cases have been dismissed or where there is no disposition found as opposed to where there are two or three convictions?

A Convictions, of course carry greater weight. There is times when a man is consistently arrested every now and then through the years, four, five, six times, serious charges. I take that into consideration. I don't give it the weight that you might think.

Q But these are situations where the cases have been dismissed or --

A Yes.

Q Now, do you have problems or are there problems logistically, I would suppose, in getting a file from the trial part to Special 10?

A No; sometimes a momentary inconvenience, that's all.

Q But you usually get the file when you need it for Special 10 motions?

A Yes.

Q Do you often have people from the community who are familiar with the defendant's background, say his family or his employer or clergy or so on, when motions are made in Special 10?

A That's been asked prior to your coming, and I said I permit anybody at all to say anything they wish, they are not put under oath, They may, if they wish, rise, give their names. I have them say anything they wish.

Q Does it happen often?

A Reasonably, not too often. Pretrial service is now participant to a greater degree than before.

THE COURT: In Special 10 motions too?

THE WITNESS: Yes.

Q Approximately, what percent of the cases, if you can judge, does a pretrial service agency make an appearance?

A - A small proportion.

Q 10 percent?

A If you want to say that, I see them reasonably often.

Q And how often do you release a defendant to their program?

A Depends upon the individual case.

Q Can you give us an estimate of how many times

since they have been functioning, they have appeared before you at Special 10?

A I prefer not to speculate because they haven't come in until recently before me.

Q And have they appeared before you in the trial part?

A No. I'm in a homicide part, releasing anybody is a rare exception in a homicide case.

Q Now --

A Unusual.

Q Now, how long have you been sitting in the homicide part?

A Definitely three years, and then from time to time -- three I have been exclusively in the homicide part I would say at a minimum of three years.

Q When I ask you, Judge Barshay, what factors do you consider when you make a determination to set bail or to reduce bail?

A I told his Honor -- at first I must provide with the provision of 510.30, those are the essentials which the Judge says -- he has it and you have it -- and then any other factors that the lawyer calls to my attention or that I elicit by questioning myself, but an important part is a long delay in the trial of a case. I'm going to volunteer

something that you haven't asked me. Regrettably, the lack of preparation by both sides except in unusual cases, but the run of the mill case I don't condone preparation that starts at 5 minutes to 10. I with due modesty -- as a lawyer here would certify -- that when I was practicing on either side I was known more for my preparation than anything else. When I came --

THE COURT: That's the heart of trial work. Anyway, go ahead, Mr. Latimer.

Q I haven't been practicing anywheres as long as Judge Barshay --

A Great part of delay.

Q How old on an average if there is an average is a case when it comes before you in Special Term 10?

A I'm trying '72 cases now.

Q When a bail motion comes to you, are the bail motions on an average 3 months old, 6 months old?

A The motions --

Q How old is the case by the time it comes before you?

A I'm trying '72 cases now.

THE COURT: You are trying '72 homicide cases. I think what Mr. Latimer is concerned about, the average person whose bail motion comes in Special 10,

has he been in jail 3 months, 6 months.

THE WITNESS: As early as 2, 3 months and as long as a year and 15 months and sometimes as long as 2 years.

Q And is there a typical or an average number of times that the case has appeared, an indication that the case has appeared in the trial part that counsel has been requested to appear in the trial part before the case comes to you in Special 10?

A On the folder there is a chart which must contain the date, the Judge and the adjourned date. All I have to look at is the folder and I could see.

Q In your experience in sitting in Special 10 for 3 years, does a case come to Special 10 after two appearances in a trial part or after 10 appearances, or after 5 appearances?

A I can't certify it correctly, but reasonably as soon as the lawyer gets an urge -- or an instruction or a request he could come to Special 10.

Q But he makes his bail motions in the trial part first?

A Yes, if he's dissatisfied he comes before me.

Q And is it your experience in Special 10 that there are sequential bail reductions in the trial part before

they come to you?

A Not too often.

Q And does the record -- does the folder indicate how many bail reduction motions were made in the trial part?

A Yes, should be.

Q And again, is there an average in your experience?

A I can't average.

Q Is the number of bail reductions and the frequency of the bail reductions a factor in your determination in Special 10?

A Could be.

Q How long, again, if there is an average, is it since the last bail reduction that was made in a trial part?

A It's up to the lawyer. It's up to the defendant. I don't limit anybody. They can come as often as they want. If they have any new factor that could be called to my attention, which is subject to consideration, I don't mind.

Q What would be a new factor?

A Well, there are so many, discovery, the new witness, for example. I'll give you an illustration. I found a witness which I'm submitting to the District Attorney

who would exculpate the defendant and he's now with the District Attorney, or is being questioned by the District Attorney, or the District Attorney promised that he would review something which hasn't been called to his attention.

Q And this is in Special 10?

A It's called to my attention; yes.

Q Isn't that more properly the function of the trial Judge?

A It should be, that's why I review these things. I don't hunt for them. Sometimes a lawyer will say something.

(Continued on next page.)

CROSS-EXAMINATION

BY MR. LATIMER: (Cont.)

Q Judge Barshay, is the defendant's root in the community an important factor?

A Very important.

Q Very important. And is it your experience as a trial Judge that for a person in jail his roots in the community will deteriorate the longer he's kept incarcerated?

A Of course, it's natural.

Q So that means then that if you grant the bail reduction motion to a person who has been in jail or you release a person on his own recognizance who's been in jail 15 months, his roots in the community will be substantially less at that stage of the case than initially?

A It could be.

Q And wouldn't the same --

A Not initially but it could be.

Q Has it been your experience that family ties of these people are weakened the longer they stay in jail?

A I can't say that. That depends upon the individual family relationship.

THE COURT: These are argumentative questions, Mr. Latimer.

Q I'm sorry. Is the likelihood of the defendant's

reappearance one of the considerations that go into the determination?

A Certainly it's a factor.

Q And does the defendant's roots in the community have influence in that?

A One of the factors, yes.

Q Isn't a defendant who has strong roots in the community more likely to appear in Court than one who has weaker roots?

A I can't answer that. I just let out two fellows in $100 bail each in a murder case and on the adjourned date one didn't appear and I became very fearful.

Q But he did appear.

A Eventually he did, some erroneous explanation, I don't want to say false, I'll say erroneous, and I was very worried if he had committed a crime during that period -- as I told the Judge before you came, that I would be subjected to great criticism.

Q Wouldn't the same consideration be served releasing a defendant on bail, setting a bail on a defendant made earlier in the case when --

A It's up to the lawyer and up to the defendant. I don't go out searching for these motions. I sit there, if anybody makes a motion I hear it and give him full consideratio

Q Now, when a motion is made to you at Special 10 you have before you the results of prior bail motions or do you have before you the results of prior bail motions?

A The Clerk puts on my calendar bail now $25,000, that's all I have.

Q When you are hearing the motion, do you know whether that bail was set by the trial Judge or at arraignment or how many times?

A If a lawyer calls it to my attention, or I elicit it personally by questioning him. The record itself doesn't show.

Q Will the record show the reasons why a Judge --

A The minutes will but not the record.

THE COURT: You don't have the minutes.

THE WITNESS: I don't get the minutes.

Q So that you don't really know why that particular bail was set?

A No, I don't.

Q Would you find it helpful in your determinations to have that information?

A If the lawyer is prepared, he should tell it to me. That's his obligation, not just to walk in and say my client is a nice fellow. He has a nice family and he goes to church and the reverend is here. I want to hear something

about the defendant.

Q What I'm asking you, Judge Barshay, would you find it helpful to have in front of you at Special 10 or any other time you are making a review of bail or a bail setting determination, whether you would find it helpful to have the reasons why the prior Judge, be he a Criminal Court Judge or Supreme Court Judge, set the bail conditions that he did set?

A My experience regrettably the Criminal Court Judge or the Arraignment Judge doesn't give his reasons, so that the minutes wouldn't help me in that respect.

Q But you would find it helpful?

A Anything in the world that helps me considering the rights of a defendant.

Q Now again, do you state the reason for your bail determination on the record?

A No.

Q Do you think it would be helpful for another Judge on the case if you did?

MR. HOFFMAN: Objection.

MR. LATIMER: I'll withdraw that question.

THE COURT: All right.

Q Can you define for the Court and for us what you consider to be a reasonable bail?

MR. HOFFMAN: Objection.

THE COURT: Sustained.

Q You testified, I believe, you would find evidentiary bail hearings helpful. Was that your testimony on direct examination?

A If the lawyer asked -- as of now I cannot point to a single incident where an evidentiary hearing was requested. If it was requested, I would grant it.

Q As you are aware and the Court is aware, the criminal procedure Section 520.10 provides for eight different alternatives, forms of bail. In your experience in Special 10, how many of those particular forms are used?

A All of them.

Q How many times have you fixed an unsecured appearance bond?

A I can't say. I haven't the statistics.

Q How many times have you set a security bond?

A I can't say because I didn't prepare the statistics for that. Regrettably I didn't anticipate that question.

Q Let me ask you again. What are the most common forms of bail that you and the other Judges in that Court have?

A The most common form is the amount of bail and

the alternative in cash.

THE COURT: Surety bond or cash.

THE WITNESS: Yes. It doesn't have to be surety bond, real estate, $2,500 bail or 10 percent.

Q You say that can be real estate. You mean real estate as collateral for the bond?

A Either that or if the people could put up -- that has nothing to do with me -- they could put up a house for example that meets the requirements of the security, that's all right with me, but that doesn't come to me.

Q I understand that. What I would ask you now. Have you ever -- has either an attorney or a defendant complained or brought to your attention a situation where because the person is from a ghetto neighborhood they have had difficulty to have the bail bondsman accept a house, real estate as collateral?

A Yes, I've heard them.

Q And if you know, is this more common in a ghetto where a person is a ghetto resident or from another background?

A I don't know of any ghetto neighborhoods. I have an individual before me as a human being with equal rights. I don't know where he lives.

Q I'm not asking --

THE COURT: You're trying to get statistics from the Judge that I don't think he's either prepared or is really within the scope of his direct examination.

Q Judge Barshay, you testified that you used the cash alternative?

A - Yes.

Q What criteria governs the use of cash alternatives when you are --

A No special criteria. The lawyer will sometimes ask and sometimes I'll make my own decision. After I size up the whole situation, the charge, the background, the length of time in jail, the roots, and if I feel it's safe a man should offer $500 cash bail -- I told the Judge I paroled a lady and gave her name, she's on parole now in a murder case.

Q In the use of cash alternative, the most common form of bail, is it secured surety bond or insurance company bond?

A Just --

MR. HOFFMAN: Objection.

THE COURT: Let's get on to questions, Mr. Latimer; questions that are not something that you'll be repeating in the brief.

Q Now again I would ask the Judge to be specific

in telling us when he uses a cash alternative and when --

THE COURT: I think he's given us an explanation of that. I don't know what more to expect.

Q When an attorney asks for a particular amount of cash to be fixed --

A I consider it, if it's reasonable, it's granted. If I deem it unreasonable, I deny it, or I fix a sum other than what he asks.

Q Is that sum more often higher or lower?

A Counsellor, if you want to pin me down to statistics, the amount of work that I have I can't answer you. You'll have to look at the record yourself or ask me to prepare it.

THE COURT: What else do you need, Mr. Latimer.

Q The Judge testified from these statistics. He doesn't know how many people were released after those bail reductions?

A The Clerk's Office can give you that.

Q I would just ask in another area, and this is in terms of your trial practice. Have you had in the past problems with the production of defendants in the Courthouse, and in your Courtroom?

A Delay in production of prisoners instead of being there 10 o'clock, sometimes they don't get in until 12,

sometimes they don't get in until the afternoon; sometimes the reason is they don't come at all, and I've complained to the Captain of the Guards, the Warden, whatever you call them; and I complained that I spend too much time in the hallway waiting for the prisoner to come into the Courtroom.

Q What's been the response to your complaint?

A Chances are that I hear this, your Honor they are on their way.

Q Has the situation with regard to the production of prisoners --

A Improved since September.

Q Is there still a problem with production of prisoners?

A To a lesser degree.

Q Judge Barshay --

A Another reason some of the prisoners in the homicide cases may come from jurisdictions beyond the City of New York, they are up in Sing Sing, it takes longer to bring them down.

Q And have you found more of a problem with the non-production or delay in the production of prisoners from Sing Sing than other City institutions?

THE COURT: You are spending a lot of time on generalities.

Q I'm asking him --

A I can't answer you.

Q Judge Barshay, do you require the appearance of a defendant in Court every time his case is scheduled?

A That's the rule. If he's on my calendar and he's in the building, I make no disposition until he's produced before me, that's the rule since September. That wasn't the rule prior thereto.

Q But now even this applies in a case where the case is just going to be adjourned?

A I don't care what the reason is. If he's in the building -- my inquiry of the Clerk is, is he here and he has a yellow card and he says he's been produced or he's not been produced and he makes a record.

Q In your experience, have you dismissed indictments for failure to grant a speedy trial when a motion has been made?

A My friend in the homicide part is little different than in the other part. I'm not going to dismiss a murder case unless there is very good and sufficient reason. But I've never dismissed a case in the homicide case for failure to prosecute.

THE COURT: If youre still trying 1972 cases, what is the prospect of getting up to date so somebody

will be tried on a homicide within 6 or 8 months.

THE WITNESS: If the case is on my calendar I make the order and I'm strict about it. I can't interfere with anybody else.

THE COURT: Do you see light at the end of the tunnel where you'll be able to try these things faster.

THE WITNESS: The budget said we need more manpower.

THE COURT: All right, excuse me. See if you can finish up.

Q There is a good deal of testimony about calendar practice and calendar control and testimony to the effect that the calendar control has shifted from the District Attorney to the Supreme Court as of, I believe the day was August 1st of this year, prior to August 1st of this year. Who selected the case that was going to be tried in your part?

MR. HOFFMAN: I object, I don't think that's relevant.

THE COURT: I wish you wouldn't be so repetitious.

A I would have a calendar prior to September. I call the calendar, defendant ready, People ready, proceed. The District Attorney says I'm ready on number 1 or ready on

number 3. If I get a case ready in the old case with both sides ready -- my idea of being ready, I'm very lucky.

Q Has that situation changed?

A Changed completely. Now we control the calend and I fix the date and I insist they be tried in the order i which I set them, and that's the way that is going to be as long as I'm a Judge.

Q Since September 1, 1974 with a defendant who might be out on bail, who has the responsibility of notifyin him of the trial date?

A We have new rules, lately promulgated by Mr. Justice Damiani. If it's within two weeks, I say to the lawyer, you come back here October 7; I say to the defendant, if he's on bail, you're not going to get any other notice. If it's beyond that, I understand the rule is going to be, if it isn't already, the Clerk is to advise both the lawyer and the defendant and bondsman in writing.

Q Now, in addressing the problem, backlog in murder parts, Justice Damiani testified --

THE COURT: Let's not have --

Q This is my last question. Justice Damiani testified that they have taken some quantity of murder cases and transferred them to other parts. Would this be a solution to abolish murder parts and let the case go --

THE COURT: Objection. I'm not going to tell the Judge how to run things. I'm here to determine constitutional rights.

A Everything which aids in the progress in the administration of justice, aids in the solution.

THE COURT: Anything else, Mr. Hoffman.

MR. HOFFMAN: No further questions.

MR. LATIMER: No further questions.

CROSS-EXAMINATION

BY MR. WEBER:

Q Judge Barshay, do you have a calendar of the inmate defendants that morning who are due to appear before you?

A I have a calendar given to me on Friday for the entire week.

Q Do you know how many defendants are to appear before you on whatever date it is?

A Yes, I have a record. I have a diary in every respect.

Q What percentage would you estimate appear before you by 10 a.m.?

A Zero.

Q Do you call them?

A I'm on the bench at 10 o'clock.

Q You are on the bench at 10?

A I'm on the bench at 10. If I'm not on the bench at 10,,it's because my Clerk has told me in my chambers that nobody is in the Courtroom, so I have him telephone me the first moment -- my stenographer is there, my Clerk is there; sometimes a matter of minutes, sometimes a little longer.

Q When you ask for a defendant to be produced, who do you ask specifically to produce him?

A The Court Officer.

Q The Court Officer?

A I say to the Clerk involved bring in John Doe.

Q When there is a delay, who's responsibility is it when there is a delay?

A I don't know. I complain when it's a delay.

Q Is it the Court Officer?

A The Court Officer in our building have this disadvantage. I sit on the 9th floor, if my defendant is in the detention pen on the 9th floor I have him in 2, 3 or 4 minutes, depending on the length of time for the correction officer to document his release, but we have prisoners on the 3rd floor, that means he has to go down to the 3rd floor. He has to wait in line then he has to bring him up. It takes several Court Officers to do so, and that's a delay sometir

as long as 15, 20, 25 minutes.

Q How often would you say when there is an inmate on your calendar that he is not produced from the detention pen in the building?

A I can't say. I don't keep a record of that.

Q Do you say it's a rare occasion when an inmate is not brought to the Court building?

A I can't say that.

MR. WEBER: I have no further questions.

MR. HOFFMAN: No further questions.

THE COURT: Thank you very much, Justice Barshay.

(Whereupon Court recessed in this matter for the day.)

* * * *

as long as 15, 20, 25 minutes.

Q How often would you say when there is an inmat on your calendar that he is not produced from the detention pen in the building?

A I can't say. I don't keep a record of that.

Q Do you say it's a rare occasion when an inmate is not brought to the Court building?

A I can't say that.

MR. WEBER: I have no further questions.

MR. HOFFMAN: No further questions.

THE COURT: Thank you very much, Justice Barshay.

HLeG:jm
Reel#1

(Whereupon Court recessed in this matter.)

(After recess.)

THE COURT: Who is the next witness in Wallace? Let's swear the witness.

L E O N B O R N S T E I N , called as a witness, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q What is your present position?

A I am an Assistant District Attorney in the Kings County District Attorney's Office. I'm presently the

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DONALD WALLACE, et al. . . . on behalf of themselves and all others similarly situated, who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs,

- against - 72 C 898

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, . . . individually and as Justices of the Supreme Court of the State of New York, Kings County; and VINCENT D. DAMIANI, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; EUGENE GOLD, individually and as District Attorney for Kings County; BENJAMIN MALCOLM, individually and as Commissioner of Correction of the City of New York; . . . JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - -x

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. McLAUGHLIN, et al. . . .

Plaintiffs, 73 C 53

- against -

THE PEOPLE OF THE STATE OF NEW YORK;

(Caption continued)

THE PEOPLE OF THE CITY OF NEW YORK;
THE CHIEF PRESIDING JUSTICE of the
Supreme Court of the State of New York;
and all ASSOCIATE JUDGES of the State
of New York; NATHAN SELKIN, Chief Clerk,
Appellate Division, Second Judicial
Department; JOSEPH PARISI, Chief Clerk,
Supreme Court, State of New York; THE
LEGAL AID SOCIETY of the City of New
York; GEORGE SPANAKOS, Administrator,
State of New York, County of Kings,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - x

MICHAEL A. McLAUGHLIN, et al. . . .

Plaintiffs,

73 C 113

- against -

THE PEOPLE OF THE STATE OF NEW YORK;
THE PEOPLE OF THE CITY OF NEW YORK;
THE CHIEF PRESIDING JUSTICE of the
Supreme Court of the State of New York;
and all ASSOCIATE JUDGES of the State
of New York; THE LEGAL AID SOCIETY,
CRIMINAL DEFENSE DIVISION of the City
and State of New York; THE NEW YORK
STATE ADMINISTRATOR, County of Kings,

Februayr 14, 1975

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - -x

Appearances:

DANIEL L. ALTERMAN, Esq.
ROBERT BOEHM, Esq.
WILLIAM M. KUNSTLER, Esq.
C/o Center for Constitutional Rights

STEPHEN M. LATIMER, Esq.

Appearances (continued)

JAMES REIF, Esq.
National Lawyers Guild

ALVIN J. BRONSTEIN, Esq.
NANCY CRISMAN, Esq.
National Prison Project
Attorneys for Plaintiffs

MICHAEL A. McLAUGHLIN, Plaintiff
Pro Se

HILLEL HOFFMAN, Esq.
Assistant Attorney General

Attorney for State Defendants

A. MICHAEL WEBER, Esq.
Assistant Corporation Counsel
Attorney for defendant Department of Correction

J U D D, J.

MEMORANDUM AND DECISION

Governor Hugh L. Carey, in his inaugural address on January 1, 1975, said that

> "[T]he criminal justice system in New York does not work."

This memorandum deals with another effort to enlist the help of federal courts in making the state criminal justice system work better.

In this civil rights class action, on behalf of felony defendants housed in Brooklyn House of Detention for Men (BHD), the court has completed the trial of the remaining issues, relating to bail practices in the Criminal Parts of the Kings County Supreme Court and to alleged coercion of guilty pleas resulting from those practices.

In connection with bail practices, plaintiffs assert that state procedures are "uniformly arbitrary and unreasonable" and that this court ought to direct that there be

(1) a de novo evidentiary hearing within 72 hours after arraignment in the Criminal Court or in the Supreme Court on indictment,

(2) a written statement of reasons for fixing bail at each stage where a bail determination is made, and

(3) improvements in facilities so that attorneys may have meaningful consultations with clients who are held in default of bail.

In connection with guilty pleas, plaintiffs ask for a declaratory judgment that the cumulative impact of existing practices exerts a coercive effect on the choice

whether to plead guilty or demand a trial.

In earlier decisions, the court has dealt with two other principal claims, first that plaintiffs' rights to counsel was impaired by the excessive caseload of Legal Aid Society attorneys, and second that plaintiffs' overlong confinement denied their constitutional right to speedy trials. Both matters were decided for the defendants by the Court of Appeals, after initial grants of relief by this court, 481 F.2d 621 (2d Cir. 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879 (1974); 499 F.2d 1345 (2d Cir. 1974).

With respect to the caseload of Legal Aid attorneys, the Kings County Supreme Court has, without the compulsion of an injunction, reduced it to approximately the level recommended by this court. With respect to trial delays, there appears to have been a degree of improvement, but still short of what this court considers to be constitutional requirements.

At the hearings on the bail and coerced plea issues, the court heard six prisoners, one Criminal Court judge, three Supreme Court justices, the director of the Pre-Trial Services Agency, five Legal Aid Society attorneys, a

psychiatrist, a sociologist, two law professors, two Assistant District Attorneys, a representative of the Department of Correction, and a former president of the Legal Aid Society. In addition, the court has considered numerous depositions, and sheaves of exhibits, statistics and compilations. The last memorandum of law following the hearings was filed on December 17, 1974.

## Facts

Bail procedures must be considered in the context of trial delays, which continue in spite of strenuous efforts to remedy them. Even after many improvements in the period of more than two years since this case began, trial times are still far from the goals set in 1972 by the New York Legislature, which require that the People be ready for trial within 90 days after the confinement of a prisoner in a jail case and within six months after arrest in a bail case. Criminal Procedure Law § 30.30. Accurate statistics proved to be elusive, but Justice Damiani, the Assistant Administrative Judge in charge of the Criminal Branch of the Supreme Court in the Second Judicial District, testified in September 1974 that the July 31, 1974 figures showed 347

nine months. On December 31, 1972 there had been 644 defendants who had been at BHD more than six months, and nearly half that number over a year. See Memorandum dated May 10, 1973, in this case.

Of the last ten Supreme Court trials in which the Legal Aid Society had been involved, as testified on October 18, 1974, the defendants had been in jail for periods ranging from 184 to 521 days. The accompanying exhibit showed that the ten trials resulted in one conviction on the charges, three convictions for lesser felonies or misdemeanors, one dismissal and five acquittals. In July 1973, when a similar report was made by the Legal Aid Society of the most recent trials, the defendants had been in jail for an average period of from 10 to 14 months (300 to 420 days), and two out of seven were acquitted.

Keith Ryan, one of the named plaintiffs in this case, with no prior felony arrest, spent fourteen months in jail, and ultimately was acquitted.

## The Existing Bail Practices

The bail system in the Kings County Supreme Court is a multi-stage process. It begins in the Criminal Court when the defendant is arraigned after his arrest and bail is set for the first time. There is a theoretical second appearance in the Criminal Court within 72 hours for the preliminary hearing, but this is usually adjourned. At the preliminary hearing, if one is held, bail may be reduced or the defendant may be released on his own recognizance (ROR), but testimony indicates that this seldom occurs unless there is a guilty plea or a substantial reduction in the charges. There may be a delay of 45 days before indictment of a defendant charged with a felony, with the defendant held in jail. (Defendants charged with felonies must be released on their own recognizance unless indicted within this period. Criminal Procedure Law § 190.80) Within a week or two after indictment, a defendant will be arraigned in Supreme Court. Although it was stated that at the Supreme Court arraignment there is in essence a de novo bail hearing, it was conceded that generally "those who are in stay in, and those who are out, stay out."

Within a few weeks after his Supreme Court arraignment, the defendant's case will be called in the conference part, to determine whether a plea bargain can be arranged; at that time he may again apply for bail review. Within a few more weeks the case will be assigned to a trial part, and bail review applications may be filed in the motion part and considered in the trial part. A further application in Part 10 is permissible if the defendant still cannot meet his bail requirements. Applications in the Supreme Court for habeas corpus are also available, and may be reviewed in the Appellate Division.

During the Criminal Court stage, inadequate information and inadequate access to counsel adversely affect the defendant's possibility of release pending trial. The average bail proceeding takes only about two to five minutes. The prior criminal record is a major factor in determining both whether bail will be required and the amount of bail. The existence of a prior criminal record is initially determined by a report of The New York State Criminal Investigation Information Service (NYSIIS), which in turn is based on the F.B.I. fingerprint record. The NYSIIS report contains a record of all arrests, but it is incomplete with respect

to dispositions in from 75% to 90% of the cases. Determining what happened after the arrests is a time-consuming job, especially for arrests outside of Kings County, and is rarely done.

The personal history and roots in the community are another important factor in determining whether bail will be required and the amount of bail. These facts are based on an ROR sheet (Release on Own Recognizance). The Pre-Trial Service Agency is now available to check the various items on the ROR sheets, but in most instances it is not possible to verify facts favorable to a defendant before the initial bail hearing. Open charges on the NYSIIS report are often given weight, and unverified favorable facts on the ROR sheet are often denied weight. The testimony in this case justifies a finding that more defendants would be released on their own recognizance or on low bail if more information could be verified at an early stage.

Most defendants who are held in jail for non-homicide charges have a prior criminal record. This was true of the named plaintiffs in this case. No statistics were provided to show the relative number of first offenders and

of people with records who fail to return to court if released after arrest. Professor Harry Subin of New York University Law School testified concerning the opinion of unnamed bail bondsmen that there was a greater risk with an amateur than with a professional criminal. Supreme Court Justice Irwin Brownstein testified that a subconscious fear of new crimes being committed while a defendant was at large formed a factor in bail determinations.

Bail review at the Supreme Court arraignment seldom results in the release of a defendant who has been in jail since his arrest. Substantial weight is given to the initial determination of the Criminal Court Judge, although the basis of his determination is not before the court. Even if the Criminal Court Judge explained on the record the reasons for fixing a particular bail, the minutes of the hearing are never available in the Supreme Court. Arraignments in the Supreme Court, like those in Criminal Court, usually take from two to five minutes. Most attorneys lack time to investigate case dispositions or verify information on the ROR form. Supreme Court Justice Damiani said that he accepts the defendant's statements concerning the disposition of open charges and has found them to be accurate 95% of the time, but many

arraignment judges treat defendants' statements as suspect.

In the conference part the defendant does not see a judge unless he agrees to plead guilty. He is kept in a holding pen, where his attorney may consult with him to report any plea offers.

Some measure of bail relief is available in Part 10, where Mr. Justice Hyman Barshay has been sitting for three years, since the part was created. The records show that he has granted bail reductions in a majority of the cases that came before him. No information was provided as to the number of defendants who were able to obtain their release after Part 10 bail reductions, but there was testimony for plaintiffs that the bail set in Part 10 could have been met if it had been set earlier. The average person whose bail motion comes on in Part 10 has been in jail at least two or three months, often as long as a year or more, and sometimes as long as two years. Justice Barshay makes the decision on bail reduction after hearing oral argument from a defendant's attorney, which includes information on length of incarceration, age, background, occupation, roots in the community, court appearances, and the gravity of the

charges. Cases where he releases a defendant on his own recognizance are generally those where he has been in a long time and the gravity of the charges is not great.

Mr. Justice Damiani testified concerning the urging by Chief Judge Charles D. Breitel to improve the situation. He gave his opinion that in many instances a defendant in jail can get a trial within six months. The court believes that this may be true of a man whose attorney makes constant and vigorous motions for bail reduction and speedy trial; but the many burdens on lawyers, and the low level of fees provided under Article 18-B of the County Law mean that in practice the ordinary defendant in jail cannot get a trial until his regular turn. In individual cases, where this court has directed release unless there is a speedy trial, the Supreme Court has afforded a trial.

On over-all bail release, the director of the Pre-Trial Services Agency testified that about 43% of all defendants were released at their initial arraignment, and about 10% or 15% at some later stage. It appears that considerable weight will be given to an employer or clergyman's support of a request for release or for low bail.

Little use is made of any alternative forms of bail other than cash or a surety bond. Even the forms

prepared for use by judges are geared to make release without bail harder, for the rubber stamps which are provided have spaces only for the amounts of insurance company bonds or cash bail. Any other form of release must be written out by the judge.

With respect to evidentiary hearings, Judge William H. Booth, who has served for five and a half years on the Criminal Court, testified that he had received no request for an evidentiary hearing, but that he would grant one if requested. He also said that subsequent information would frequently justify parole or a reduced bail. The decision, however, is often influenced more by the original bail determination than by new facts. A Legal Aid witness said that the evidence to be presented at the proposed hearing after 72 hours would consist mainly of a verified ROR sheet, a Pre-Trial Services report, and a completed NYSIIS form, if the other agencies could cooperate in checking the information.

With respect to statements of reasons for fixing bail, it appears that Judge Ross, who had been the Administrative Judge of the Criminal Court, sent a memorandum to the judges directing them to put reasons in writing on the papers

for bail determinations. While many judges put such reasons in the record, only a few write them on the papers. Since the record is not transcribed, the reasons are not available for consideration by the Supreme Court Justice.

Concerning the risk of non-appearance by a defendant, the director of the Pre-Trial Services Agency (PTSA) reported that the skip rate on persons released on their own recognizance was about 8%, of which only about 4% were wilful. Some non-appearances are a result of misunderstanding or illness or simply inability to find the part of the court in which the defendant was supposed to reappear. Of those detainees whom PTSA recommended for release on their own recognizance, the skip rate shows as low as 2%, with higher rates on those whose qualifications for release could not be verified. However, the director testified that in an "expanded release" program in February, 1974 when 66% of all defendants were released on their own recognizance, the skip rate was only 8.7%, which did not show a valid statistical difference from the general rate.

The Pre-Trial Services Agency has experimented with a supervised release program, which involves cooperation

with community agencies to assume some responsibility for defendants who are released pending trial. For a ten-month period it reported that only 3.2 percent of a total of 377 scheduled appearances resulted in the issuance of a bench warrant. The possible expansion of this program was not explored.

No correlation was shown between the percentage of defendants who failed to appear and the seriousness of the crimes charged, or the number of prior convictions. In fact, the attorney in charge of the Criminal Defense Division of the Legal Aid Society asserted that the skip rate was lower on more serious charges. The evidence on this particular point was inadequate to support a finding by the court.

A collateral point which was not covered by any evidence is the source of bail. It is common knowledge that in a substantial number of cases bail is not posted by the defendant but by a relative, friend or organization. No percentage statistics are available.

There is no limit to the number of times that any defendant can apply for bail review.

The Study in the Bellamy Case

Plaintiffs submitted to the court a copy of a study made in New York County in connection with the Legal Aid Society's attack on the bail system before the First Department Appellate Division in John Bellamy, et al. v. The Judges and Justices Authorized to Sit in the New York City Criminal Court and the New York State Supreme Court in New York County. The citation of the case and a discussion of the opinion appears later in this memorandum. The study in Bellamy was made by Eric W. Single, a doctoral candidate in sociology at Columbia University, who was associated with the University Bureau of Applied Social Research and a teacher of Methods of Social Research at City College. An analysis of 287 closed cases showed that a man out of jail has twice as good a chance of being cleared, of avoiding prison, or of having a short sentence, as the man in jail, regardless of the type of crime, the existence of a confession, the finding of evidence on his person, the existence of aggravating circumstances, the prior criminal record, the strength of family ties, or the employment status at the time of arrest. The 857 cases included 790 which arose and were finally disposed of in the Criminal Court, and 67 which arose in either the

Criminal Court or the Supreme Court but were ultimately disposed of in the Supreme Court.

An opposing affidavit by Judge Irving Lang, Supervising Judge of the Criminal Court for New York County, asserted that there were actually dispositions shown for only 736 of the 857 sample cases and that the remaining 121 were subject to bench warrants issued for non-appearance between conviction and sentencing. The raw material for the Bellamy study, in the Appellate Division file, includes 100 pages of computer printouts prepared by Calculogic Corporation and approximately 170 pages of opposing affidavits relating to bail practices generally and to individual cases included in the Legal Aid Society study.

Dr. Single presented live testimony to this court. He described a further study of 1200 cases that he had made in 1973, again showing that the outcome for people on bail is better than for those who remain in jail. This study, however, was only of Criminal Court cases. He was not familiar with ROR sheets, or with the Pre-Trial Services Agency, or Manhattan bail review procedures, and could not say whether Manhattan and Brooklyn were fully comparable.

Access to Counsel

Facilities for consultation between counsel and an incarcerated defendant are admittedly inadequate. Efforts to improve the facilities have been made, but state court officials did not claim that they are presently anywhere near an optimum standard.

In the Criminal Court, Legal Aid Society attorneys consult their clients in a bullpen area about 15 feet long and 10 feet wide, containing two benches, but no tables or desks, and usually occupied by a number of defendants, up to 40, together with correction officers and police officers. Interviews are conducted while the attorney and client are standing up. Defendants are frequently reluctant to talk frankly about their cases. The lack of privacy and of quiet impose a severe obstacle to the creation of any satisfactory lawyer-client relationship. Private attorneys and 18-B attorneys must speak to their clients on a bench within the courtroom, and are not permitted access to the bullpen.

In the Supreme Court the situation is not much better, except that the third floor facilities have been greatly improved during the course of this action. There are

no courtroom holding cells and it sometimes takes from 10 to 15 minutes to get a prisoner from the fourth floor holding cells to the ninth floor for an appearance in court. On the ninth floor, there is no suitable place for a conference between the defendant and his attorney.

Justice Damiani said in September that he hoped to put up panels to give more privacy to attorney-client interviews. No timetable was set up, however.

The provisions for visitation at detention centers are also unsatisfactory. Delays in getting an inmate from the cell block to the counsel room at BHD permit an attorney to see only one or two defendants in a morning or afternoon session. A visit to Rikers Island is a long trip and requires half a day to see one inmate. Consequently, many lawyers wait until a client is produced in court before consulting with him.

The compensation of 18-B attorneys is still limited to $10 an hour for time out of court (less than the charge for labor on automobile repairs) and $15 per hour for time in court. Mr. Justice Brownstein testified that fee applications even at these rates are frequently reduced by the Appellate

Division.

Effects of Incarceration

Various forms of prejudice were shown to result from prolonged incarceration. Because it is difficult for a white lawyer or investigator to speak with persons in the black or Hispanic communities, incarceration hampers contact with potential defense witnesses. Witnesses who might have been available are often lost; the prosecution also suffers from delay and the resultant attrition of witnesses, but to a lesser degree. Defendants are likely to lose jobs which they could retain if released, or which an employer might keep open for a brief time. Their family relationships are impaired. Inmates suffer from personality changes, a feeling of helplessness, a loss of faith in the judicial process, and emotional upsets.

Whether an inmate is convicted or acquitted, his period in jail is a period that is useless, or nearly so. If he is acquitted, there is no way to compensate him for the time that he has lost or the personal hardships that he has suffered. If he is convicted, he has lost the opportunity for rehabilitation, which is one of the basic purposes of sentencing. BHD and QHD lack the facilities for vocational

training, education, recreation and adjustment to honest labor, which penal institutions seek (however unsuccessfully) to provide. There are a substantial number of such programs at both BHD and QHD, but they are restricted in capacity by the physical layout of the buildings and by limitations of staff and budget.

A defendant's opportunity for early parole, if convicted, is impaired because he has not been able to build up a record with the prison authorities during the time for which he has been in pre-trial detention. The psychiatrist at BHD states that a state prisoner who knows his sentence is in a much better psychological situation than a pre-trial detainee who is under the anxiety of not knowing when he will be tried or what the result of the trial may be. Even in matters like recreational activity, medical care and dental care, the pre-trial detention facilities are inferior to the services provided up-state for sentenced prisoners.

The court finds that trial results are likely to be less favorable for a prisoner in jail than for one who is at large, though the extent of the difference cannot be defined. The man who is in jail is also less likely to be given probation

if convicted, than the man who is on the street. This result is inevitable, for a man at large has had an opportunity to build an employment record and show his conformity with the law during the one to three years which will have preceded his trial.

All generalizations are subject to exceptions. Plaintiff Michael McLaughlin is an illustration of the possibility of rehabilitation even during pre-trial detention. Although the District Attorney described him to the court as a dangerous man, he was released on a plea with a sentence to time served, after this court directed that his indictment be brought to trial, and he has worked successfully for more than a year as a paraprofessional with the Center for Constitutional Rights.

If a prison sentence is imposed, the evidence in this case indicates that it is generally shorter for a man at large than for one who is already in jail, although the extent of variation cannot be determined, as the plaintiffs in the Bellamy case sought to do.

## Alleged Coercion to Plead Guilty

With respect to coerced pleas, no specific examples were shown of any defendant who was in fact innocent and who pleaded guilty because of the length of his confinement. However, Samuel H. Dawson, then the Assistant Attorney in Charge of the Legal Aid Society's Brooklyn office, testified that many defendants asserted their innocence, but took guilty pleas in order to get out of jail. Although there was some evidence that the best plea offers are made at the beginning of a case, he testified that on many occasions a defendant may be offered a misdemeanor plea or a one-year sentence followed by probation and that such an offer is hard to resist when the jail time has already been served before trial. Professor Bernard Segal of Golden Gate University testified that there is coercion to accept less than the defendant's full constitutional rights, and to give up believable defenses in exchange for the termination of lengthy pre-trial confinement. Mr. Justice Damiani also said that the length of stay in jail may tend to coerce a guilty plea.

In the end, 90% to 95% of all defendants plead guilty. About 25% of the pleas are received at the time of

the conference. Most of the rest come when the District Attorney moves the case for trial, or at the time of trial, or just after a suppression hearing. In the state courts the denial of a motion to suppress may be reviewed on appeal from a guilty plea.

Several improvements in procedure have been accomplished during the two and a half years thatthis case has been in process. A "vertical" system has been introduced by the Legal Aid Society to endeavor to provide continuity of representation by the same attorney throughout a case. The number of criminal parts has been increased from 20 to 37. The judges have been directed to try the oldest jail cases first.

Non-production of prisnners in court has been reduced. "Record cards" are now supposed to accompany a defendent to and from court. Instructions have been given that a date for the next court appearance by the defendant must be entered on the card before he is returned to the place of detention, so that there will be a definite record to assure his production on the next date. The percentage of prisoners produced in court has increased from 80% to 95%, although

not all are there at 10:00 in the morning.

Orders have been given that every defendant who is brought to the courthouse should be brought before a judge, but the actual figures show a failure to obtain full compliance with this problem. In March, 1974, 29% of the prisoners delivered to court were not seen by a judge. In June 1974 the percentage not seen by a judge had been reduced to 23%, and in August to 16%, according to Department of Correction statistics, which may suffer from some inaccuracy.

Actual court control of calendars was put into effect in the late summer of 1974, but it is too early to determine the extent to which this may remedy problems of delay that arose when the calendars were prepared by the District Attorneys.

There are judges, prosecutors and Legal Aid attorneys who are striving valiantly to achieve prompt trials, fair bail determinations, and all the accompaniments of due process, but the present system creates serious obstacles.

Discussion

The bail question involves different considerations from the claim concerning coerced pleas.

Bail

Amendment VIII to the United States Constitution guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The constitutional guarantee against excessive bail does not mean that bail is a matter of right in all cases. Carlson v. Landon, 342 U.S. 524, 545-46, 72 S.Ct. 525, 537 (1952) (alleged illegal alien held pending deportation). See also United States ex rel. Covington v. Coparo, 297 F.Supp. 203, 206 (S.D.N.Y. 1969), where Judge Weinfeld stated:

> ". . . a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably; but, under the Eighth Amendment, where bail is fixed in either instance, it must not be

"excessive, and further, where bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail."

Although freedom from excessive bail is not clearly binding on the states, Schilb v. Kuebel, 404 U.S. 357, 365, 92 S.Ct. 479, 484 (1971), the Court of Appeals in this circuit "entertain[s] little doubt" that in an appropriate case the Supreme Court will make the bail provisions of the Eighth Amendment applicable to the states. United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972). The New York State Court of Appeals finds sufficient authority in lower court federal cases to reach the same conclusion. People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 499, fn 1, 307 N.Y.S.2d 207, 209 fn 1 (1969).

In any event, the prohibition against excessive bail is enunciated in similar terms by the federal and state constitutions. See New York State Constitution, Art. 1 § 5. The purpose of bail, and the recognition of individual factors in the determination of bail, are also similar. See Practice Commentary to § 510.30 of New York Criminal Procedure Law in McKinney's Consolidated Laws.

In Stack v. Boyle, 342 U.S. 1, 4-5, 72 S.Ct. 1, 3-4 (1951), the court struck down a $50,000 bail uniformly set for twelve conspirators charged with violation of the Smith Act. The bail was deemed excessive under the Eighth Amendment because it was not set in compliance with statutory or constitutional standards. The court said:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285, 15 S. Ct. 450, 453, 39 L.Ed. 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.
>
> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Ex parte Milburn, 1835, 9 Pet. 704, 710, 9 L.Ed. 280 . . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

Justice Jackson's specially concurring opinion further stated (342 U.S. at 8, 72 S.Ct. at 5):

> "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. . . ."

In Bellamy v. Judges and Justices, 41 A.D.2d 196, 342 N.Y.S.2d 137, 139, aff'd without opinion, 32 N.Y.2d 886, 346 N.Y.S.2d 812 (1973), the court ruled that a class action seeking a declaratory judgment as to the constitutionality of the bail system was not a proper class action "because there are individual determinations to be made in every bail application . . . ". Quoting from People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 111 (1947), the court listed individual factors a judge must consider (342 N.Y.S.2d at 139)

> "The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat. The factual matters to be taken into account include: "the nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction. . . ". (citations deleted)

Additionally, Article 500 of the Criminal Procedure Law, enacted in 1970 in an attempt "to bring clarity and consistency to the area of 'release on recognizance and bail'" (See Practice Commentary, 11 A McKinney's, at p. 8), embodies, in Section 510.30, the same limitations imposed by Stack.

Section 510.30, subd.2, C.P.L., states:

"(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) the principal's character, reputation, habits and mental condition;
(ii) his employment and financial resources; and
(iii) his family ties and the length of his residence if any in the community; and
(iv) his criminal record if any; and
(v) his previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
(vi) if he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
(vii) if he is a defendant, the sentence which may be or has been imposed upon conviction."

These factors are substantially similar to those which a federal court is directed to consider under the Bail Reform Act of 1966. 18 U.S.C. § 31[illegible](b).

The further purpose of preventive detention (refusal of bail for fear that the accused will be a danger to society if allowed to remain at large while awaiting trial) had been considered by the Temporary Commission on Revision of the Penal Law and Criminal Code and was rejected.

The forms of bail authorized by the New York Criminal Procedure Law are limited to the following:

"§ 520.10
1. (a) Cash bail.
(b) An insurance company bail bond.
(c) A secured surety bond.
(d) A secured appearance bond.
(e) A partially secured surety bond.
(f) A partially secured appearance bond.
(g) An unsecured surety bond.
(h) An unsecured appearance bond."

The "unsecured surety bond" may be a bond executed by a surety other than an insurance company, and payable if the defendant fails to appear. CPL § 500.10(19). This affords a bail-setting judge an alternative midway between requiring cash bail or a surety company bond and releasing the defendant on his own recognizance. In effect, the unsecured surety

bond provides the financial obligation of a third party, which may have to be enforced in a civil action, but which does indicate that someone else is ready to accept a substantial risk in order to guarantee the defendant's appearance.

The American Bar Association's Standards Relating to Pretrial Release (Approved Draft 1968) specify subjects of inquiry similar to those in the Criminal Procedure Law and the Bail Reform Act. They emphasize especially the presumption that a defendant is entitled to be released on his own recognizance unless there is a finding that there is substantial risk of non-appearance (Section 5.1), and expressly provide that in any event (Section 5.2(a)),

> " . . . the judicial officer should impose the least onerous condition reasonably likely to assure the defendant's appearance in court."

The Standards also provide for automatic re-examination of the release decision if the defendant has failed to secure his release within a reasonable time (Section 5.9(a)), and for frequent reports to the court concerning each defendant who has failed to secure his release.

In the Bellamy case, the Legal Aid Society mounted a full scale attack on the bail system. The case was brought in the Appellate Division as an original application for prohibition or mandamus directed to the Judges of the Criminal Court and the Justices of the Supreme Court. The Appellate Division considered the attack on the constitutionality of the bail system to be insubstantial, on the basis of the Schilb case, supra. It pointed out that the problem of bail jumping, which resulted in 31,855 bench warrants being issued by the Criminal Court in New York County alone in a period of less than two years, showed a substantial risk of non-appearance. 342 N.Y.S.2d at 143. In respect of the showing that a man on bail was less likely to be convicted than one in jail, the court said (342 N.Y.S.2d at 144):

> "It is not because bail is required that the defendant is later convicted. It is because he is likely to be convicted that bail may be required.
>
> ***
>
> The factors for allowing bail, when properly applied, generally lead to a conclusion that those denied bail are more likely to be convicted, and if the statistics prove this out, as they do, it shows the system is working rather than, as plaintiffs contend, that it is, instead, detrimental to a defense against an accusation."

The Bellamy case was presented to the Appellate Division on affidavits, without live testimony, and was decided without specific findings on the factual issues presented. The statistics offered by the Legal Aid Society in the Bellamy case seem to this court to have more validity than the Appellate Division accorded them, but they cannot be applied in this case. For one thing, this court would have to analyze not only the single study, but the opposing affidavits, which were not placed into evidence here and were not the subject of argument. (The Appellate Division record was borrowed temporarily from that Court for consideration during the preparation of this memorandum). Even assuming that the Bellamy statistics were accepted at face value, and that criminal defendants in Kings County are similar to those in New York County, there are other differences which were not explored. The Bellamy study included only 67 Supreme Court cases, which may not be an adequate sample. The actual practices used in fixing bail in New York County may be different from those prevailing in Kings County. This court cannot take judicial notice that judges are fungible. There were indications at the hearings in this court that trial delays are more serious in Kings County than in New York

County, but no evidence was directed to the extent of differences or to the effect of such differences on incarcerated defendants.

The New York Court of Appeals agrees with the federal rule that bail be determined with reference to the facts in the individual case. Thus the court stated in People ex rel. Klein v. Krueger, supra, 25 N.Y.2d at 501, 307 N.Y.S. 2d 211, that

> "Even where an exercise of discretion is operative there must, as a matter of law, be underlying facts which will support that exercise either in denying bail or fixing the amount of bail."

Bail has been found to be excessive, in violation of the Eighth Amendment, where the amount is more than is necessary to guarantee the presence of the accused at his trial. Sellers v. United States, 89 S.Ct. 36, 38 (1968) (bail pending appeal); United States ex rel. Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946); People ex rel. Lobell v. McDonnell 296 N.Y. 109 (1947).

Plaintiffs' attack on the Kings County bail system must be further analyzed, however, with respect to equal protection factors and due process factors.

Equal Protection

The question of denial of equal protection to the indigent by the requirement of bail was raised by Mr. Justice Douglas in Bandy v. United States, 81 S.Ct. 197, 198 (1960). He said, in considering an application for release on personal recognizance:

> "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying his release. . . "

Chief Judge Bazelon cited the Bandy case in a separate opinion dealing with an appeal from the denial of a motion to reduce bail, and emphasized the court's responsibility to explore non-financial alternatives. (Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965)), saying:

> "[I]f the court determined that high monetary bond would adequately deter flight, but that appellant could not provide this bond, then the court would be constitutionally compelled to inquire

> "whether other assurances of appellant's presence would be adequate. It is an invidious discrimination to deny appellant release because of his poverty when, for example, his ties in the community or such devices as release subject to the supervision of the United States Probation office, would adequately insure his presence." (Emphasis added).

The challenge of Bandy has not been considered by the Supreme Court, although that Court has moved steadily forward since Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956) in requiring that justice be applied to all persons equally and not on the basis of ability to pay. Treating wealth as a suspect classification, a statute which provided imprisonment only for those who could not pay their fines was stricken down in Tate v. Short,401 U.S. 395, 399, 91 S.Ct. 668, 671 (1971). The existence of alternative methods of protecting the state's interest was used in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849 (1972), as a ground for striking down a high filing fee in connection with Texas primary elections.

In Williams v. Illinois, 399 U.S. 235, 242, 90 S. Ct. 2018, 2023 (1970), the court concluded that an indigent could not be required to "work off" his fine at $5.00 a day

because this would be an "invidious discrimination solely because he is unable to pay the fine."

A district court, in United States ex rel. Shakur v. Commissioner of Correction, 303 F.Supp. 303, 309 (S.D.N.Y. 1969), noted that the money bail system in recent years has come under close scrutiny and that the Federal Bail Reform Act of 1966 "reflected an acute awareness of the problems inherent in the system." See United States v. Leathers, 412 F.2d 169 (D.C.Cir. 1969). But the system per se was found to be "consistent with the respective interests of the person accused of a crime and the legitimate concerns of the law-abiding community." (303 F.Supp. at 309 - Palmieri, J.)

The crucial factor is that the initial determination of bail should not be an arbitrary one and that reviews of bail should be determined on the facts pertinent to the individual case.

With respect to the necessity for individual consideration of the right to bail, a pertinent case is Ackies v. Purdy, 322 F.Supp. 38, 42 (S.D. Fla. 1970), where a master bond schedule set a fixed monetary sum as bail for particular charges. The court struck it down as violative of both the

due process and equal protection clauses of the Fourteenth Amendment, saying

> "Since the function of bail is limited to assuring the presence of a defendant at trial, Stack v. Boyle, supra, it is obvious that money amounts set solely by the charge have no relation to the function of bail. A poor man with strong ties in the community may be more likely to appear than a man with some cash and no community involvement. So, not only is there no compelling interest in incarcerating the poor man because he cannot make the master bond bail, but the classification fails to meet the traditional test for equal protection:
>
> > 'Equal protection does not require that all persons be dealt with identically, but does require that a distinction made have some relevance to the purpose for which the classification is made.' Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 763, 15 L.Ed.2d 620 (1966)."

To decide whether a law violates the equal protection clause, Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999 (1972), teaches us to examine

> " . . . the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

The compelling state interest test was used in the Dunn case to deal with a durational residence requirement on the right

There is a compelling state interest in having defendants available when their cases are reached for trial. The admittedly large number of defendants who default and for whom bench warrants must be issued furnish proof that some guarantee of the defendants' return for trial is necessary.

Fixing money bail as a guarantee for appearance at trial is not necessarily discriminatory. The standards set forth in the New York Criminal Procedure Law are intended to fix a sum as bail which will assure the defendant's appearance at trial. A higher sum may be required of an affluent man than of an indigent one. Freeing all who are poor might in fact discriminate against the well-off, for a rich man would lose money by not appearing, while an indigent person would lose nothing, except the risk of the same criminal penalty for escape which applies to rich and poor alike.

Money bail is therefore not as blatantly discriminatory, as Professor Foote asserts in his article in the University of Pennsylvania Law Review. See, generally, The Coming Constitutional Crisis in Bail, I and II, 118 U. Pa. L. Rev. 959, 1125 (1965).

Another significant factor not emphasized by either party is that bail is often put up by relatives, friends, or organizations, and not by the defendant in person. In one of the earliest prison release cases, not officially reported, Pythias asked the Tyrant of Syracuse for an opportunity to say farewell at home before sentence was executed against him. He could furnish no tangible security for his return, but he had a friend, and Damon pledged his own liberty and his life to guarantee Pythias' return. A man cannot go to jail today for his friend, but he can put up money.

In other words, a man who cannot make reasonable bail is not held simply because he is poor, but because he has not established sufficient roots in the community, or a sufficient reputation for reliability, so that someone else will guarantee his return.

Plaintiffs complain that the alternatives to cash bail or surety bond in CPL § 520.10 are not often used. Six of the eight alternatives provided in Section 520.10 boil down to either cash or a surety bond or security of some sort. The last two are an unsecured surety bond and an unsecured appearance bond, which is another name for release on his own

recognizance. Release on his own recognizance may be justified where the defendant has roots in the community, or where some form of supervision can effectively assure his appearance. Supervised release deserves further implementation, but it is not a constitutional requirement on this record.

Although the court concludes that monetary bail is not in itself a violation of equal protection, the determination that bail in a particular amount is appropriate must still meet the requirements of due process.

Due Process

Due process is a phrase of many shadings, with different requirements for different circumstances. At its lowest, it should require a hearing, an opportunity to present evidence, and a statement of reasons for the decision that is reached. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972); Goss v. Lopez, ____ U.S. ____ (Jan. 22, 1975).

The Morrissey case dealt with the right to hearings in parole revocation proceedings. The Court held (408 U.S. at 480,489, 92 S.Ct. at 2600,2604) that such proceedings did not call for "the full panoply of rights due a defendant [in a criminal]

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proceeding," but that there should be

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body [whose members, however, need not be judicial officers or lawyers]; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. . . "

Some measure of due process has long been considered necessary whenever a person is "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647 (1951).

The bail procedure in Bronx County was criticized by a state court judge as abrogating "a basic liberty," because it did not provide for adequate information to determine the apparent strength of the prosecution's case. People v. Vasquez, 348 N.Y.S.2d 1007 (Crim. Ct., Bronx Co. 1973).

In connection with the denial of parole, which proceeded for years with only nominal hearings, it has recently been held that findings of fact are necessary. United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925, 934 (2d Cir. 1974). The Court there said:

> "[D]etailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision (e.g., that in its view the prisoner would, if released, probably engage in criminal activity) and the essential facts upon which the Board's inferences are based (e.g., the prisoner's long record, prior experience on parole, lack of a parole plan, lack of employment skills or of prospective employment and housing and his drug addiction).
>
> * * *
>
> A reasons requirement 'promotes thought by the decider,' and compels him 'to cover the relevant points' and 'eschew irrelevancies.' See Frankel, Criminal Sentences 40-41 (1973)."
> Id. at 931.

The same rule has recently been announced for state parole release hearings, Solari v. Vincent, N.Y.L.J. February 3, 1975, p. 1 (App.Div. 2d Dept. Jan. 20, 1975), where Mr. Justice Martuscello stated:

> "We require merely that the board state, however briefly, the ultimate grounds relied on with sufficient particularity to enable a reviewing court to determine whether inadmissible factors have influenced the decision and whether discretion has been abused."

The reasons for denying parole are different from those at issue in a bail determination, but the necessity for findings is the same.

As the court pointed out in a bail case, United States ex rel. Keating v. Bensinger, 322 F.Supp. 784, 787 (N.D. Ill. 1971), if no reasons are given for denial of bail,

> ". . . it is impossible to ascertain whether or not such denial was arbitrary or discriminatory.
>
> * * *
>
> [T]he failure to indicate the motivating reasons for the denial of bail is in and of itself an arbitrary action that violates the Eighth and Fourteenth Amendments."

There the court said it would direct release on habeas corpus unless the state court promptly elucidated the reasons for its action.

The requirement for a written statement was also applied by the Supreme Court in Wolff v. McDonnell, _____ U.S. _____, 94 S.Ct. 2963, 2978-79 (1974), with reference

to decisions depriving an inmate of good time credit.

The constitutional right to review a state bail determination by federal habeas corpus further emphasizes the need for a statement of reasons; otherwise it is difficult for the habeas court to determine whether the amount of bail is arbitrary or discriminatory and whether the defendant has been denied a fair trial or the right to counsel. Bobick v. Schaeffer, 366 F.Supp. 503 (S.D. N.Y. 1973).

In the federal system, there is provision by statute and rule for written reasons for imposing bail that cannot be met, if a request is made. In connection with pretrial detention, 18 U.S.C. § 3146(d), states:

> "A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."

In practice few defendants ask to have reasons set forth in writing, probably because the Individual Assignment System minimizes the necessity for making the reasons available to another judge and because pretrial detention is relatively short.

Where a defendant requests reasons for refusal to reduce bail, he is entitled to an individualized statement. In United States v. Briggs, 476 F.2d 947 (5th Cir. 1973), where the district court had stated that several factors justified a fixed bond for each of eight defendants, the case was remanded with the statement that (p. 949):

> "Without expressing any view as to the merits of the defendants' claims, we think at a minimum each defendant is entitled to know the reasons why the particular conditions of release were imposed in his case."(Emphasis from the opinion).

There is a separate provision relating to determination of bail pending appeal in the event of conviction. Rule 9(b) of the Federal Rules of Appellate Procedure states,

> "(b) Release pending appeal from a judgment of conviction.
>
> Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal,

> "or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof."

Standards for the statement of reasons have been laid down by the Court of Appeals of this circuit in United States v. Manarite, 430 F.2d 656, 657 (2d Cir. 1970), where the Court found that the record supported the district court's denial of bail after a conviction for extortion, but stated:

> "The district judge should state clearly and categorically his reasons for denying bail so that in reviewing his decision this court, and the Circuit Justice, may be fully advised regarding the basis for his action.
>
> . . . Of course an opinion stated on the record of the bail hearing is sufficient compliance with the requirement of a written opinion, but we do not consider extensive colloquy without any definite statement in conclusion to be in accordance with the Rule."

The importance of a written statement of reasons under F.R.A.P. 9(b) was discussed by the District of Columbia Court of Appeals in United States v. Stanley, 469 F.2d 576,

585-88 (D.C. Cir. 1972), which concluded with the words,

> "We admonish counsel and trial judges alike to tap every available source of information potentially helpful to a solid decision on releasibility."

The importance of evidence and findings appears also from the New York Court of Appeals decision on a pre-Bellamy attack on the bail system. The Court of Appeals there pointed out that the amount of bail may not be fixed solely by the nature of the offense, but it held that the court had discretion to determine whether a defendant's roots in the community were strong enough to assure his appearance for trial if released on his own recognizance. People ex rel. Gonzalez v. Warden, 21 N.Y.2d 18, 286 N.Y.S.2d 240 (1967), cert. denied, 390 U.S. 973, 88 S.Ct. 1093 (1968).

A few more comments about plaintiffs' specific prayers for relief are in order.

1. Evidentiary Bail Hearings

The nature of the hearing at a bail application may vary with circumstances. What has been said above does not answer all the questions.

After indictment, the court may consider grand jury minutes with respect to the strength or weakness of the case against the defendant. People ex rel. Machuca v. Glick, 38 A.D. 2d 916, 329 N.Y.S.2d 834 (1st Dept. 1972); People v. Terrell, infra, 309 N.Y.S.2d at 784-85.

It is interesting to note that bail reductions were granted in a majority of cases in Part 10, notwithstanding repeated testimony that family relationships and roots in the community deteriorate after periods of incarceration. In fact, Justice Barshay testified that he allowed people familiar with a defendant's background to speak up for him, but that it was "not very often" that anyone did. These facts strongly suggest that the initial bail determinations might have been different if evidentiary hearings had been held early in the bail setting process.

Relief in the form of conditions to be met by a state court in bail hearings was granted in Ackies v. Purdy, supra, 322 F.Supp. at 43-43, where the court specified the considerations to be used in fixing conditions of release.

In Monroe County, an evidentiary bail hearing was granted in a murder case, and resulted in release on $10,000 bail, secured by a neighbor's property. People v. Terrell, 309 N.Y.S.2d 776 (Monroe Co. Ct. 1970).

Evidentiary hearings may also promote more frequent use of alternatives to cash bail or surety bonds. In one case, a bail determination was remanded to consider "those minimal nonfinancial conditions of release which will 'assure the appearance of the person as required.'" instead of "unreachable money bonds." United States v. Leathers, supra, 412 F.2d at 173.

Plaintiffs' proposal for an evidentiary hearing within 72 hours after arrest is based on analogy from CPA § 180.80, which directs release of a felony defendant on his own recognizance after 72 hours in custody without a preliminary hearing, unless he has consented to the delay, or unless good cause is shown why release should not be granted. The 72-hour period does not thereby become a measure of constitutional right. A workable rule is set forth in the Conclusion of this Memorandum.

The fact that few defendants have specifically requested evidentiary hearings in the past does not obviate the need for relief in this respect. Rather, it reflects the speed with which bail determinations have been made and the inadequacies of the "system." On the other hand, automatic evidentiary hearings would impose burdens on the courts in many cases where such a hearing would not be fruitful.

The Supreme Court has held that there must be a jury trial on any offense which involves the possibility of imprisonment for more than six months. Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 1453 (1968), as interpreted in Argersinger v. Hamlin, 407 U.S. 25, 29, 92 S.Ct. 2006, 2008 (1972). It would be anomalous to permit a defendant to be held in jail for more than a year, without a trial, without any evidentiary hearing, and without a statement of the reasons why his bail is fixed at a figure that he cannot meet.

The court has considered the recommendations of the Temporary (Dominick) Commission on the New York State Court System in its report, " . . . And Justice for All"

(Jan. 1973), Part II, pp. 65-69, that cash bail should be abolished in favor of a system of absolute release, conditional supervised release, or absolute detention. The report made recommendations which may have merit as a basis for legislation, but this court does not regard these recommendations as establishing a constitutional standard.

2. Statement of Reasons for Bail Determination

Given the different stages at which bail is considered by a series of judges, it is important that there be a statement of reasons available to the defendant and his attorney. The nature of such statement should be worked out in individual cases, but the considerations affecting bail are specifically listed in CPL § 510.30 and could form the basis for an informative written statement, without undue burden on the court.

If written reasons are required, the courts may give more substance to the expectation set forth by the Bellamy court (342 N.Y.S.2d at 143) that after the 1972 amendment of the Criminal Procedure Law § 520.10:

> "[T]wo types of bail became the more usual form '(g) an unsecured surety bond and (h) an unsecured appearance bond', meaning that an accused would not have to deposit any money and merely incurs a legal obligation."

Since state appellate review of bail determinations is available only in habeas corpus proceedings, and review in such a proceeding is limited to the question whether constitutional or statutory standards have been violated, People ex rel. Klein v. Krueger, supra, 25 N.Y.2d at 499, 307 N.Y.S.2d at 209-10, it is important not to conclude this case without setting forth the federal constitutional standards that must be met.

3. Facilities for Consultation with Counsel

The undesirability of prolonged detention is aggravated by the lack of proper facilities for consultation between a defendant and his attorney. Some efforts are being made in Kings County Supreme Court to improve the facilities for consultation with counsel, but they are not enough.

Federal court supervision of this subject is not barred by O'Shea v. Littleton, 414 U.S. 388, 94 S.Ct. 669 (1974).

Plaintiffs and their class in this case are all detained for want of bail, and therefore have the personal stake which was found lacking in O'Shea (94 S.Ct. at 675). The relief contemplated herein concerning the standards for bail hearings will not require the monitoring of state court proceedings which was feared in O'Shea (94 S.Ct. at 679). It will set standards which may be applied in individual bail review proceedings.

The relief contemplated herein with respect to access to counsel while in the courthouse detention facilities is sanctioned by the Supreme Court's statement in Procunier v. Martinez, _____ U.S. _____, 94 S.Ct. 1800, 1807 (1974) that:

> "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether rising in a federal or state institution."

The right to confidential interviews with counsel was discussed in Rhem v. McGrath, 326 F.Supp. 681, 691 (S.D.N.Y. 1971), where Judge Mansfield said concerning the Tombs:

> "We think it only fair . . . that the inmate be afforded a full opportunity to confer or correspond with his attorney in privacy, and without observation, interference, or listening in. . . ."

The correction authorities were directed to submit a plan for modification of detention facilities to permit confidential attorney-client interviews in Souza v. Travisono, 368 F.Supp. 959, 971-72 (D.R.I. 1973 - Pettine, Ch. J.), aff'd in part, 498 F.2d 1120 (1st Cir.. 1974). The right to privacy in communication with counsel was there described as "vital to due process to guarantee the effective assistance of counsel."

Protection of the Sixth Amendment right to counsel is particularly important where defendant is frequently not brought into the courtroom in the conference part, when bail and plea-bargaining are discussed.

### 4. Coerced Pleas

The principles affecting plaintiffs' attack on guilty pleas are similar to those discussed in relation to bail. The matter is not capable of a general rule.

A federal court should not cast doubt on thousands of state court guilty pleas by a broad new definition of coercion.

The general rule is that a guilty plea waives objections to the prior proceedings, and cannot be set aside if the defendant had adequate legal advice, unless some legal safeguard has been omitted. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970); Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1474 (1970). Adequate consultation with counsel is a necessary condition for a valid guilty plea. Windom v. Cook, 423 F.2d 721 (5th Cir. 1970); Braxton v. Peyton, 365 F.2d 563, 564 (4th Cir.), cert. denied, 385 U.S. 939, 87 S.Ct. 306 (1966). Risks of coercion may be minimized by better facilities for consultation with attorneys. But the effect of inadequacies in consultation facilities should be determined on a case-by-case basis.

A plea of guilty results from a complex of factors. Among these are defendant's present knowledge of his guilt or innocence, and the knowledge of what evidence against him may be expected in court. In cases where there is sentence

bargaining in addition to plea bargaining, as in the state courts, the relation between the proposed sentence and the risk at trial is important.

Prolonged confinement in unsatisfactory detention facilities certainly creates a pressure to plead guilty, if only to start a definite term in better quarters. This does not make it appropriate, however, to assert by declaratory judgment that a particular period of detention per se makes a guilty plea invalid.

A great majority of state court convictions are based on guilty pleas, and no evidence has been offered to show that any substantial number of those who pleaded guilty were in fact innocent. Primarily, the question of coerced guilty pleas involves an area for determination by individual cases and not by class action.

5. Prompt Trials

Prompt trials would alleviate many of the objections to the bail system. Plaintiffs' request for relief on that score was denied on the second appeal in this case (supra, p.5), but it is clear that the prejudice resulting from any

pretrial confinement is aggravated when that confinement is prolonged.

Even though a federal court cannot fix a uniform time limit for state court trials, a state court should consider the length of time a defendant has been in custody in determining the reasonableness of bail at each stage of his case.

As Judge Weinfeld stated in United States ex rel. Covington v. Coparo, supra, 297 F.Supp. at 207:

> "In those instances where the court, in the exercise of discretion denies bail, the defendant's right to a speedy trial, a guarantee that prevents 'undue and oppressive incarceration prior to trial,' /17 assumes greater significance.
>
> /17 United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966)."

The same principle applies where bail is fixed at an unreachable figure, that the length of pre-trial detention increases the importance of due process protections in fixing bail.

The Asserted Violations of Comity

Finally, the court should mention defendants' assertion that federal jurisdiction is forbidden by the principles of comity expressed in Younger v. Harris, 401 U.S. 37, 91 S.Ct.746 (1971), and Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764 (1971). Those cases are quite different from the present one, since the plaintiffs there sought to prevent state court prosecutions. All that is brought in question in this suit is the necessity of pre-trial confinement, and the due process requirements before the state can take away the liberty of a man whose guilt has not yet been established. Improper pre-trial confinement would not be an issue on a defendant's trial on the criminal charge.

The conditions of pre-trial confinement are a proper subject of federal concern. Rhem v. Malcolm, _____ F.2d _____ (2d Cir. Nov. 8, 1974). In Younger, in contrast, plaintiffs sought an injunction against state prosecution, and in Samuels a declaratory judgment to invalidate a pending indictment. Although Samuels found that a declaratory judgment is no more permissible under those circumstances than an injunction, the Supreme Court has more recently

pointed out that different considerations apply to declaratory judgments than to injunctive relief. Steffel v. Thompson, _____ U.S. _____, 94 S.Ct. 1209, 1219-22 (1974). This case is more like Conover v. Montemuro, 477F.2d 1073 (3d Cir. 1973), where the court distinguished the Younger and Samuels cases, in dealing with the intake procedures in the Philadelphia Family Court. See also this court's earlier discussion of the question in Wallace v. McDonald, 369 F.Supp. 180, 185-88 (1973).

Plaintiffs here are not seeking even interference with any pending bail application, but an announcement of the constitutional rights to which they and other members of their class are entitled.

The decision on the first appeal in this case, concerning the treatment of pro se motions, 481 F.2d at 622, is not controlling here. This court's proposed requirements of evidentiary hearings and written statements of reasons are necessary to enforce constitutional rights announced by the Supreme Court and the Court of Appeals (supra, pp. 44, 45). The question whether a pro se motion should be considered was less important, since almost every detainee has

a lawyer, who could presumably present the same motion.

Summary of Legal Conclusions

Although pre-trial confinement under the conditions existing in the Kings County Supreme Court creates substantial prejudice both to the effective defense of the detainee and to his ultimate fate if convicted, the requirement of monetary bail as a condition of release does not per se violate the equal protection clause of the Fourteenth Amendment. Provided the court has considered the individual factors concerning the risk of a defendant's failure to appear for trial and the inadequacy of other alternatives, the state's compelling interest in having the defendant present for trial justifies the use of monetary bail in a proper case. A defendant's inability to post the required bail may reflect not simply poverty, but lack of sufficient roots in the community to induce someone else to guarantee his presence. The due process clause, however, requires that a decision which may result in prolonged confinement shall be based on full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached.

Preparation for a bail hearing, for plea bargaining, and for trial require adequate opportunity for consultation between the defendant and his attorney, which should be in conditions of privacy.

The necessity of improvements in the bail system is enhanced by the considerable length of time which frequently elapses in pre-trial confinement in Kings County.

The factors which lead a person to plead guilty are too diverse to justify any general determination as to what circumstances result in a coerced plea.

Conclusion

Judgment should be entered:

1. Denying plaintiff's prayer for an injunction against the use of money bail as a condition for release from custody.

2. Declaring that a criminal defendant charged with a felony and confined in the Brooklyn House of Detention is entitled:

(a) to a hearing at which the People shall present evidence of the need for monetary bail and the reasons why alternative conditions of release will not assure

his return for trial and at which he may present evidence on factors negating the need for monetary bail, such evidentiary hearing to be had on demand at any time after 72 hours from the original arraignment, and at such other times as new evidence or changes in facts may justify;

(b) to receive a written statement of the reasons for denying or fixing bail, and to have a de novo bail hearing on request if he is held in custody without a written statement of reasons for the bail determination;

3. Directing the defendants, Administrative Judge, Commissioner of Correction, Chief Clerk of the Supreme Court, and Clerk of the Criminal Term of the Supreme Court, within forty-five days after the filing of such judgment, to submit to plaintiffs' counsel and file with the court a plan for assuring privacy for conferences between an incarcerated defendant and his attorney at the time of his arraignment on any complaint or indictment, and at any appearance in the conference part of the Supreme Court, and at bail review proceedings, and a timetable for implementing the plan; and that the court retains jurisdiction to review the plan and its implementation; and

4. Determining that the question whether guilty pleas are coerced by reason of a defendant's long pre-trial confinement should be considered on a case by case basis, and not in a class action; and

5. Dismissing the complaint, without costs, except as outlined above.

Settle judgment on notice of three working days.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - X

DONALD WALLACE, et. al.,
Plaintiffs,

-against-

MICHAEL KERN, etc. et al.
Defendants.

- - - - - - - - - - - - - - - - - - - - - X

THE UNITED STATES OF AMERICA ex rel.
MICHAEL A. McLAUGHLIN, et. al.
Plaintiffs,

-against-

THE PEOPLE OF THE STATE OF NEW YORK
et. al.,
Defendants

FINAL JUDGMENT ORDER
AND DECREE

- - - - - - - - - - - - - - - - - - - - - X

MICHAEL A. McLAUGHLIN, et. al.
Plaintiffs,

-against-

THE PEOPLE OF THE STATE OF NEW YORK
et. al.,
Defendants

- - - - - - - - - - - - - - - - - - - - - X

The action having come on for trial before the Court, the Honorable Orrin G. Judd presiding, on Plaintiffs' motion for permanent declaratory and injunctive relief, and the court having rendered its memorandum and decision on February 14, 1975,

(1) IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs' motion for an injunction enjoining the use of monetary bail as a condition of release from pretrial incarceration, be and hereby is denied; and it is further

(2) It is DECLARED pursuant to 28 U.S.C. 2201, that the Eighth and Fourteenth Amendment rights of criminal defendants charged with felonies in Kings County not to have excessive bail imposed, and to due process of law are violated in that the bail determining practices of the Kings County Criminal and Supreme Court deprive them of liberty without due process of law; and it is further

(3) ORDERED, ADJUDGED AND DECLARED, pursuant to 28 U.S.C. Sec. 2201, that a criminal defendant, charged with a felony in Kings County and confined at any institution under the care, custody and control of the defendant Department of Correction be entitled

(a) to a hearing at which the People shall recommend

what form of security if any, would secure the defendants' appearance in Court and, only if monetary bail is recommended, the People shall present evidence of the need therefore, and the reasons why alternative conditions of security should not be available; and at which the defendant shall be present and may present evidence cognizable by the court on the factors negating the need for money bail, which hearing shall be had, on written or oral demand, and on five days notice to the People, at any time after 72 hours after arraignment or as new evidence or changes in facts may justify thereafter;

(b) the prosecution shall have the burden of proving the need for monetary bail and shall state the reasons why non-financial conditions of release, as well as other financial alternatives prescribed by state statute (CPL Sec. 520.10) will not assure the accused's reappearance at trial.

(c) this evidentiary hearing must be given within five (5) days after a demand is made or at the next scheduled court appearance of the defendant whichever is sooner.

(d) the demand may be made orally in open court or in writing, pro se or by counsel.

(e) if the demand is made in writing it shall specifiy information sufficient to identify the defendant and shall also set forth the current conditions under which the defendant may be released and in the case of alleged new evidence or changes in circumstances, the new circumstances or evidence;

(f) pretrial incarceration of sixty days shall be a change in facts sufficient to justify a de novo bail hearing; and it is further

(4) ORDERED, ADJUDGED AND DECLARED that a criminal defendant is entitled to receive a written statement of the reasons for denying or fixing bail including the facts relied on and to have a de novo bail hearing upon five (5) days notice to the People, if he/she is held in custody without a written statement of reasons for the instant bail determination; and it is further

(5) ORDERED, ADJUDGED AND DECREED that defendants, Administrative Judge, Commissioner of Corrections, Chief Clerk of the Supreme Court and Clerk of the Criminal Term of the Supreme Court within 45 days after filing of this judgment, submit to plaintiffs' counsel and file with the court, a plan including a timetable for implementation thereof, for assuring privacy for conferences between an incarcerated defendant in a criminal proceeding and his/her attorney at (a) the time of his/her arraignment on any complaint or indictment brought in the name of the People of the State of New York; (b) at any appearance at the conference part of the Supreme Court; and (c) at bail review proceedings, and at every appearance of the defendant in the Kings County Criminal or Supreme Courts; and it is further

(6) ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction to review the plan referred to in paragraph (4), hereof and its implementation and to make such further order or reason as necessary; and it is further

(7) ORDERED that counsel for the Plaintiffs are required to notify members of their class who are housed at

all institutions under the care, custody and control of the Department of Correction and who have been accused of the commission of felonies in Kings County. Plaintiffs' counsel shall deliver to the defendant Department of Correction an adequate number of notices describing this judgment and the Court's memorandum of decision, dated February 14, 1975; and it is further

(8) ORDERED that Defendant Department of Correction shall place and affix in conspicuous places in the day rooms of each floor of those institutions at least two copies of this attached notice to Plaintiffs' class; and it is further

(9) ORDERED that counsel for the Plaintiffs' shall be able to inspect housing floors one time in the Brooklyn House of Detention and other institutions to assure that the class has been given adequate notice of this judgment by giving reasonable notice to the Warden and arranging a time convenient to the parties; and it is further

(10) ORDERED that the issue of whether guilty pleas are coerced by reason of a defendant's prolonged pretrial incarceration should be determined on a case by case basis; and it is further

(11) ORDERED, ADJUGED AND DECREED, that except as hereinbefore provided, the second amended complaint herein be and hereby is dismissed without costs.

ENTER

Dated: Brooklyn, New York
March 25, 1975

S/ Orrin G. Judd
U. S. D. J.

NOTICE TO CLASS

On February 14, 1975, United States District Judge ORRIN G. Judd ruled that conditions of bail or pretrial release must be determined in a manner consistent with your constitutional rights to a reasonable bail. He entered this judgment in the lawsuit Wallace v. Kern, brought by inmates of the Brooklyn House of Detention in order to protect the rights of indigent criminal defendants. The judgment applies to all incarcerated persons indicted in Kings County Supreme Court or accused of felonies in Kings County Criminal Court, regardless of where they are detained.

Judge JUDD's order pertains to all those criminal defendants who have been jailed after arraignment because they cannot post the bail set in their cases. At any time after arraignment in the Criminal Court, you or your lawyer may request an evidentiary hearing into the question of bail. You can make this request either in writing or orally in court or by sending a letter to the court clerk. Once you make the request, you are entitled to a hearing within five days of the request or at the next court appearance whichever is sooner.

At the bail hearing, you or your attorney may present all information relevant to your bail situation (e.g. community ties, work record, character references). Make sure you discuss what information is needed with your lawyer before presenting it in Court.

You will be produced in Court at the hearing when your bail is reviewed so that you may present any relevant information. You should remember that it is very important to have anyone that could provide favorable information for you present in court, and if they cannot appear on a particular day you can request an adjournment of the hearing until they can appear.

At the evidentiary hearing the District Attorney must present evidence of the need to set a money bail and must show why an alternative, non-financial form of release (such as ROR or release into someone's custody) is not enough to assure your return to court and presence at trial. At any time, when there is new evidence or a change in facts, you are entitled to an evidentiary hearing. Pretrial incarceration of 60 days is a change in facts that justifies such a hearing.

The judge considering bail must give you a statement of the reasons and the facts relied upon for every bail determination made in your case. If you do not receive such a statement, you are entitled to a new bail hearing to be given in accordance with the above guidelines.

You should remember that you do not have the right to an evidentiary bail hearing unless you specifically request one. The written request is enough. If you make this request and are represented by counsel you should discuss doing this with him or her. Your lawyers will know the impact of the injunction too.

Judge JUDD also ordered the City and the Department of Correction to come up with a plan within 45 days of the signing of the judgment that will allow private interviewing between you and your lawyers in the bullpens of the Supreme and Criminal Courts.

If you want a clarification of the terms of this order you should call or write either MERLE RATNER or DANIEL L. ALTERMAN at the CENTER FOR CONSTITUTIONAL RIGHTS, 853 Broadway, New York, New York 10003. Telephone (212) 674-3303

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated, who have matter pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs,

-against-

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, ...individually and as Justices of the Supreme Court of the State of New York, Kings County; and Vincent D. Damiani, individually and as Administrative Judge of the Supreme Court of the State of New York, Kings County; BENJAMIN MALCOLM, individually and as Commissioner of Correction of the City of New York;...JOSEPH MANGANO, individually and as Chief Clerk of the Supreme Court, Kings County; JOSEPH PARISI, individually and as Clerk of the Criminal Term of the Supreme Court, Kings County,

Defendants.

NOTICE OF APPEAL

72 C 898
73 C 53
73 C 113

----------X

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. McLAUGHLIN, et. al. . . .

Plaintiffs,

-against-

THE PEOPLE OF THE STATE OF NEW YORK: THE PEOPLE OF THE CITY OF NEW YORK: THE CHIEF PRESIDING JUSTICE of the Supreme Court of the State of New York; and all ASSOCIATE JUDGES of the State of New York; NATHAN SELKIN, Chief Clerk, Appellate Division, Second Judicial Department; JOSEPH PARISI, Chief Clerk, Supreme Court, State of New York; THE LEGAL AID SOCIETY of the City of New York; GEORGE SPANAKOS, Administrator, State of New York, County of Kings,

Defendants.

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MICHAEL A. McLAUGHLIN, et al. . . . :

Plaintiffs, :

-against- :

THE PEOPLE OF THE STATE OF NEW YORK: :
THE PEOPLE OF THE CITY OF NEW YORK:
THE CHIEF PRESIDING JUSTICE of the :
Supreme Court of the State of New York;
and all ASSOCIATE JUDGES of the State of:
New York; THE LEGAL AID SOCIETY,
CRIMINAL DEFENSE DIVISION of the City :
and State of New York; THE NEW YORK
STATE ADMINISTRATOR, County of Kings, :

Defendants. :

----------X

S I R S :

Notice is hereby given that all defendants except the officials of the New York City Department of Corrections and the Legal Aid Society of the City of New York, hereby appeal to the United States Court of Appeals for the Second Circuit, from the final judgment, order and decree entered in this action on the 25th day of March, 1975, and from each and every part of said final judgment, order and decree, as well as the whole thereof, except insofar as it denies plaintiffs' prayer for an injunction against the use of money bail; determines that the questions of whether guilty pleas are coerced must be considered on a case by case basis; and except insofar as it dismisses the complaint

except as specifically set out in said final judgment, order and decree.

Dated: New York, New York
March ~~15~~ 28, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
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State of New York
Attorney for State Defendants-
Appellants
By

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